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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF WYOMING

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|---------------------------|------------------------|
| UNITED STATES OF AMERICA, | DOCKET NO. 20-CR-045-F |
| Plaintiff,                | Volume III             |
| vs.                       | Pages 1 - 154          |
| CODY DONOVAN SMITH,       | Cheyenne, Wyoming      |
| Defendant.                | May 12, 2021           |
|                           | 8:30 a.m.              |

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TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE NANCY D. FREUDENTHAL  
UNITED STATES DISTRICT JUDGE  
and a jury of twelve and two alternates

JANET DAVIS, RDR, FCRR, CRR  
Federal Official Court Reporter  
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Proceedings reported by stenotype reporter; transcript produced  
with Computer-Aided Transcription.

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1 (Proceedings reconvened 8:39 a.m., May 12, 2021.)

2 THE COURT: Please be seated.

3 We're back on the record in United States versus Cody  
4 Donovan Smith, Docket 20-CR-45, with the jury present.

5 Roll call is waived.

6 Counsel and their clients are here.

7 The Government may call its next witness.

8 MS. MARTENS: Thank you, Your Honor.

9 As a preliminary matter, I would like to move for the  
10 admission of what I've marked as Government Exhibit 1002 which  
11 is the second joint stipulation to evidentiary matters entered  
12 by the parties.

13 THE COURT: For the defendant?

14 MR. FREEBURG: No objection, Judge.

15 THE COURT: Government Exhibit 1002 is admitted.

16 (Government's Exhibit 1002 received.)

17 MS. MARTENS: The government would like to call Hannah  
18 Egbert.

19 (Witness sworn.)

20 COURTROOM DEPUTY: Please take a seat.

21 Ma'am, can you please state and spell your name for  
22 the record?

23 THE WITNESS: Hannah Egbert, H-a-n-n-a-h, and then  
24 E-g-b-e-r-t.

25

1 HANNAH EGBERT, PLAINTIFF'S WITNESS, DIRECT EXAMINATION

2 BY MS. MARTENS:

3 Q. Ms. Egbert, how are you employed?

4 A. Currently I am a missionary for my church, so I don't have  
5 employment.

6 Q. Are you a student?

7 A. Not right now.

8 Q. Have you been a student?

9 A. Yes.

10 Q. Where?

11 A. I was a student at BYU Idaho.

12 Q. When?

13 A. Um, from the summer of 2019 to the spring of 2020.

14 Q. So I want to talk about September 7, 2019.

15 Do you remember that day?

16 A. Yes.

17 Q. Do you know Hannah Bye?

18 A. Yes.

19 Q. How?

20 A. She was my roommate.

21 Q. How many roommates did you have?

22 A. There were six of us.

23 Q. About how long did you live with Ms. Bye?

24 A. We were there for, I'm pretty sure, five weeks. We were  
25 there for the semester.

1 Q. On the evening, or anytime on the day of September 7th, did  
2 you talk to Ms. Bye about her plans?

3 A. Yes.

4 Q. What did she say?

5 A. She said she was going to go out with someone just for --  
6 to get some food.

7 Q. And did she explain anything else about her plans that  
8 night?

9 A. No.

10 MR. FREEBURG: Objection, Judge. Hearsay.

11 And, Your Honor, given the answer, I will withdraw the  
12 objection.

13 THE COURT: All right. Thank you.

14 The answer will stand and the objection is withdrawn.

15 **BY MS. MARTENS:**

16 Q. Did she talk to you at all about Yellowstone?

17 A. She said she was going to go --

18 THE COURT: Ma'am, the answer to that would be yes or  
19 no.

20 THE WITNESS: Okay. Yes.

21 THE COURT: All right.

22 MS. MARTENS: Thank you, Your Honor.

23 **BY MS. MARTENS:**

24 Q. What did she say?

25 MR. FREEBURG: Objection, Judge, hearsay.

1 THE COURT: I would ask -- I would sustain the  
2 objection.

3 Perhaps you could rephrase.

4 MS. MARTENS: Your Honor, if I may, statements of  
5 someone's then-existing mental intention are an exception to  
6 the hearsay rule.

7 THE COURT: If you could ask her for her impression,  
8 I'm not sure if --

9 MS. MARTENS: Sure, I can rephrase.

10 **BY MS. MARTENS:**

11 Q. Did Ms. Bye explain any plans with regard to Yellowstone  
12 National Park?

13 MR. FREEBURG: Objection, hearsay.

14 THE COURT: I'll overrule it.

15 Again, ma'am, that's a yes or no.

16 THE WITNESS: Yes.

17 **BY MS. MARTENS:**

18 Q. And what did she say about those plans?

19 MR. FREEBURG: Objection, hearsay.

20 THE COURT: I would sustain the objection.

21 Ms. Egbert, what was your impression? What did you  
22 understand your roommate was going to do in relation to her  
23 plans?

24 THE WITNESS: She said that she was going to go --

25 THE COURT: What did you understand?

1 THE WITNESS: That she was going to go to Yellowstone  
2 later in the week, like later in the days, and spend the time  
3 in Yellowstone.

4 **BY MS. MARTENS:**

5 Q. Did you understand her to have any intention to go to  
6 Yellowstone that night?

7 A. No.

8 Q. Did you understand her to have any intention to be out  
9 overnight?

10 A. No.

11 Q. What did you do that night?

12 A. Um, Ellie and I watched a movie.

13 Q. And what did you do after that?

14 A. We went to bed.

15 Q. Did you ever try to contact Ms. Bye?

16 A. That night?

17 Q. That night.

18 A. No.

19 Q. The following morning?

20 A. Yes.

21 Q. Do you remember about when that was?

22 A. It was really early morning, around 5:00.

23 Q. And why did you do that?

24 A. Um, one of the roommates realized that she wasn't there  
25 that morning, and so we were worried.

1 Q. What did you do next?

2 A. We called -- contacted the police and a local bishop from  
3 our church and our parents.

4 Q. After that, did you have any way to figure out how or where  
5 she was?

6 A. Snapchat.

7 Q. Can you explain a little bit about how Snapchat works?

8 A. So with Snapchat, if you send a text message to someone and  
9 they answer, on the map it can locate where they are, and  
10 that's how we got -- found out where Hannah was.

11 Q. And do you know where Hannah was?

12 A. She was in Yellowstone.

13 Q. Were you able to communicate with her using Snapchat?

14 A. Yes.

15 Q. What did she say to you?

16 MR. FREEBURG: Objection, hearsay.

17 MS. MARTENS: Your Honor, these are excited  
18 utterances.

19 MR. FREEBURG: Objection, lack of foundation and  
20 hearsay.

21 THE COURT: I will sustain that objection.

22 BY MS. MARTENS:

23 Q. After you located her on Snapchat, what did you do?

24 A. We, um, contacted Miranda's brother to come and assist us,  
25 and -- when she got to wherever she was going.



1 Q. Did you know where that was?

2 A. Where -- where she was currently?

3 Q. Going?

4 A. We knew that they were going to drop her off in Rexburg  
5 somewhere.

6 Q. So what did you do?

7 A. Um, we had people -- or we had a roommate just kind of keep  
8 in contact with her and had Ellie going to go find her through  
9 the car, if that makes sense.

10 Q. Yes. So who all was in the car?

11 A. I'm not sure. I know Ellie was the driver, though.

12 Q. But you were not in the car?

13 A. I stayed in the apartment complex at the window to see if  
14 Cody would drop off Hannah at the complex.

15 Q. When did you next see Ms. Bye?

16 A. At the police office.

17 Q. And did you -- did you observe her demeanor?

18 A. She was shaken up.

19 Q. When -- what did you do next that day?

20 A. After the police officer had released her, we went to  
21 Brynn's parents' house.

22 Q. Did you stay with her for a while that day?

23 A. I did.

24 Q. About how long?

25 A. Um, pretty much the whole day.

1 Q. How was her demeanor the rest of the day?

2 A. She was tired, very shaky and confused the whole time,  
3 didn't really know, like -- kind of in shock.

4 Q. Did you observe any injuries on Ms. Bye?

5 A. I did not see any, but what she's told me.

6 Q. I want to ask you a couple more questions about Snapchat.

7 A. Uh-huh.

8 Q. How many different ways can you communicate with it?

9 A. You can text message, video call and send pictures.

10 Q. Do you know if -- well, when you send those pictures, how  
11 does that work?

12 A. Uh-huh, you take a picture and you can send a message,  
13 like, in it, and then you send it to them and then they can  
14 click on it and see it and vice versa.

15 Q. And what happens with that picture?

16 A. It can erase, and if you don't screenshot it or take a  
17 picture of it, it will just disappear.

18 Q. What's a screenshot?

19 A. Where you hold the power button and the volume button and  
20 it captures it on the phone.

21 Q. Does Snapchat do anything when you take a screenshot?

22 A. It notifies the other person.

23 Q. Do you know if anyone attempted to capture the Snapchats  
24 that Ms. Bye was sending?

25 A. We took pictures from another phone of the Snapchat

1 messages she was sending us because we didn't want her to get  
2 notified.

3 Q. When you were doing that, were you aware of Ms. Bye's  
4 state?

5 A. No.

6 MS. MARTENS: May I have a moment, Your Honor?

7 THE COURT: Yes.

8 (Discussion held at prosecution table.)

9 MS. MARTENS: No further questions, Your Honor.

10 THE COURT: All right. Thank you.

11 Counsel for defendant.

12 **CROSS-EXAMINATION**

13 **BY MR. FREEBURG:**

14 Q. Good morning, ma'am. My name is Alex Freeburg. I'm one of  
15 Cody Smith's attorneys. I will be asking you a few questions,  
16 okay?

17 A. Yes.

18 Q. If at any time you don't understand me, just let me know,  
19 okay?

20 A. Okay.

21 Q. And because we're making a record, you will have to speak  
22 up just a bit.

23 A. All right.

24 Q. Great.

25 So did you and Ms. Bye share a room?

1 A. We did not.

2 Q. Which roommate shared a room with Ms. Bye?

3 A. Miranda.

4 Q. Now, I want to talk about your understanding of Ms. Bye's  
5 plans that you testified to a minute ago.

6 Did you ever see Ms. Bye's Tinder conversation with  
7 Mr. Smith?

8 A. No.

9 Q. And do you know if Tinder is like Snapchat and the messages  
10 disappear, or are there still Tinder messages, or do you know?

11 A. I've never used Tinder.

12 Q. If someone in your age group -- excuse me -- uses the  
13 word "bet," B-E-T, in text, let's say, "Do you want to get ice  
14 cream?" and someone responds "bet" that means yes, doesn't it?

15 A. Yes.

16 Q. Thank you. And you don't know if Mr. Freeburg ever  
17 said "bet, I'll go to Yellowstone"?

18 A. I do not know.

19 Q. At 11:47 you texted Ms. Bye; is that right?

20 A. At nighttime?

21 Q. Yes, 11:47, the evening of the date or encounter.

22 A. Yes.

23 Q. Okay. And the time of 11:47 is significant because what's  
24 the honor code -- excuse me -- what's the curfew at BYU?

25 A. The building shuts down and you would have to get locked --

1 have permission to get back into the complex.

2 Q. What does it mean the building shuts down and you would  
3 have to get permission to get back into the complex?

4 A. Meaning the doors lock and you would have to put your pin  
5 to get in.

6 Q. And the pin is associated with, I suppose, the student's  
7 name, correct?

8 A. Yes.

9 Q. And so is it your understanding that if someone puts in  
10 their pin after midnight, that there may be an honor code  
11 investigation of a curfew violation?

12 A. Yes.

13 Q. Is it also your understanding that the honor code  
14 violations can result in punishments to the students?

15 A. Yes.

16 Q. In fact, one punishment of an honor code violation is being  
17 expelled, isn't it?

18 A. I'm not sure.

19 Q. Would it be an honor code violation at BYU Idaho for a  
20 student to go voluntarily overnight camping with a member of  
21 the opposite sex?

22 A. It is a violation.

23 Q. If you know of an honor code violation of a roommate and  
24 you fail to report it, wouldn't you also potentially be  
25 involved in your own honor code violation for failing to report

1 something you knew about?

2 A. If I knew about it, yes.

3 Q. When you texted Ms. Bye at 11:47, you texted her, "You  
4 good, Hannah?" Isn't that right?

5 A. Yes.

6 Q. Isn't it true that she responded, "Yeah"?

7 A. I do not remember the text message.

8 Q. I would like to show you something that's been previously  
9 presented as Exhibit 100.

10 MR. FREEBURG: If I may have control to present?

11 MS. MARTENS: Page, counsel?

12 MR. FREEBURG: It is 152.

13 **BY MR. FREEBURG:**

14 Q. I will represent to you -- ma'am, can you -- can you see  
15 this okay? Let me just be fair. Can you see this okay?

16 A. I can see it, but I don't understand it.

17 Q. And I will represent to you what it is.

18 A. Okay.

19 Q. This is data from Ms. Bye's cell phone that's been admitted  
20 in this case.

21 And if you look at the very bottom, do you see in  
22 the -- in the right three columns where it says: "From Hannah  
23 Egbert" and there's a number 2441 -- excuse me -- 2441. Do you  
24 see that column?

25 MS. MARTENS: Counsel, I object. That misstates

1 what's being displayed.

2 MR. FREEBURG: Let me do it with the call --

3 THE COURT: I will permit at least counsel to finish  
4 his question.

5 If you could begin again, Mr. Freeburg. I apologize  
6 for the interruption.

7 THE WITNESS: Okay.

8 **BY MR. FREEBURG:**

9 Q. So now do you see what's been highlighted on here?

10 A. Yes.

11 Q. Do you see -- and let's move from left to right.

12 Do you see log number 35195?

13 A. Yes.

14 Q. And then if you skip over several columns, you see a time,  
15 2347?

16 A. Correct.

17 Q. And then in the next column, it says: "From," and then  
18 "2441."

19 A. Uh-huh.

20 Q. Is 2441 the last four digits of your phone number?

21 A. Yes.

22 Q. And is -- well, and then below that it is your name, isn't  
23 it?

24 A. Correct.

25 Q. Do you recognize the other names on that document as your

1 roommates, Ms. Bye -- and I apologize, first name only, Brynn,  
2 Miranda Foote and Sarah Romao?

3 A. Yes.

4 Q. And then do you see where it says, "You good, Hannah?"

5 A. Yes.

6 Q. That would be the message you sent to Hannah?

7 A. Correct.

8 Q. Okay. Now I'm going to attempt to show you Ms. Bye's  
9 response.

10 Let's do the same sequence. And I think I cut off,  
11 but do you see the timestamp of 2348?

12 A. Yes.

13 Q. And do you see a response: "Yeah, I'm good"?

14 A. Yes.

15 Q. Is that what your memory is of Ms. Bye's response?

16 A. Yes.

17 Q. Ms. Romao's question comes a moment later at 2349: "Did  
18 you kiss him yet?"

19 Do you see that question?

20 A. Yes.

21 Q. What did you think of that question?

22 A. I have no thoughts on it.

23 Q. While you were on Snapchat, Ms. Bye sent you a photo,  
24 correct?

25 A. I'm not sure it was me or Miranda.



1 Q. Understood.

2 You previously testified that you saw photos, multiple  
3 photos, from Ms. Bye; isn't that right?

4 A. I did see a photo of hers once, yes.

5 MR. FREEBURG: Judge, may I approach to set up an  
6 exhibit?

7 THE COURT: Yes.

8 BY MR. FREEBURG:

9 Q. Did Ms. Bye send you this photo via Snapchat?

10 A. I don't know.

11 Q. Did Ms. Bye send you this photo via Snapchat?

12 A. I don't remember.

13 Q. If you had seen those photos, isn't it true you never would  
14 have called 911?

15 A. Yes.

16 MR. FREEBURG: Judge, may I have a moment with  
17 co-counsel? And I will put the photos down.

18 THE COURT: Yes.

19 (Discussion held between defense counsel.)

20 MR. FREEBURG: No further questions, Judge. And I'll  
21 retrieve my belongings.

22 THE COURT: Any redirect from the Government?

23 MS. MARTENS: None, Your Honor.

24 THE COURT: All right. Any objection to excusing and  
25 releasing Ms. Egbert?

1 MS. MARTENS: None, your Honor, from the Government.

2 THE COURT: Any from the defendant?

3 MR. HUGUS: No, Judge.

4 THE COURT: Thank you, Ms. Egbert.

5 By the way, where are you doing your mission work?

6 THE WITNESS: I'm in South Carolina.

7 THE COURT: Good. I hope it's going well for you.

8 Thank you for your time here today. You're excused and  
9 released.

10 THE WITNESS: Thank you.

11 THE COURT: The Government may call its next witness.

12 MS. MARTENS: The Government would like to call Elna  
13 Perkins.

14 (Witness sworn.)

15 COURTROOM DEPUTY: Please take a seat.

16 Ma'am, can you please state and spell your name for  
17 the record?

18 THE WITNESS: My name is Elna Perkins, E-l-n-a,  
19 P-e-r-k-i-n-s.

20 **ELNA PERKINS, PLAINTIFF'S WITNESS, DIRECT EXAMINATION**

21 **BY MS. MARTENS:**

22 **Q.** Ms. Perkins, what's your current occupation?

23 **A.** I'm a student and a teaching assistant.

24 **Q.** Where at?

25 **A.** At Brigham Young University Idaho.

1 Q. Were you a student in the fall of 2019?

2 A. I was.

3 Q. Where were you living?

4 A. I was living in Center Square.

5 Q. Who were you living with?

6 A. Um, I was living with Maddie Davis, Valerie Chavez, and  
7 Emily Larson.

8 Q. I think -- is that your fall semester roommates?

9 A. Yes.

10 Q. How about the summer semester roommates in September of  
11 2019? I apologize.

12 A. I was a little confused. I was, like, what is -- okay.

13 My summer roommates were Miranda Foote, Hannah Bye,  
14 Hannah Egbert, Brynn Leatham -- is that five -- and Sarah  
15 Romao.

16 Q. Do you remember September 7, 2019?

17 A. I do.

18 Q. Did you form any impression as to Ms. Bye's plans for that  
19 day?

20 A. Um, we knew she was going on a date with a co-worker, and  
21 then in the evening she later told us that she was going to go  
22 get food at McDonald's with a different guy.

23 Q. Did you understand her to intend to be out all night?

24 A. No.

25 Q. Did you form any plan with her about a ride?

1 A. She had come into my room before she left for McDonald's  
2 with the guy, and asked if she needed a ride if I would give  
3 her one. And I told her to text me when she was ready to be  
4 picked up, and then I would come get her.

5 Q. What did you do the rest of that evening?

6 A. Um, I finished my homework, and then I watched a couple  
7 movies with some of the rest of my roommates.

8 Q. At any point in the evening, did you begin to wonder where  
9 Ms. Bye was?

10 A. Yes. We actually texted her a little before midnight  
11 because midnight is curfew at BYU Idaho, so we're supposed to  
12 be back in our apartments. So we were just kind of wondering  
13 where she was. And at the time, she told us she was okay, but  
14 then she stopped responding to texts after that, so -- yeah.

15 Q. What did you do next?

16 A. Um, I stayed up until about 3:00 in the morning, kind of  
17 sort of waiting for a text still, to see if I needed to pick  
18 her up and calming myself down type of thing because she still  
19 wasn't responding.

20 And then I went to bed, and that was it for the night.

21 Q. When did you wake up?

22 A. I woke up when, um, Miranda came in and woke Sarah and me  
23 up. Sarah was my roommate, so she woke us both up after she  
24 had woken up Hannah Egbert and Brynn in the other room.

25 Q. What happened next?

1 A. As soon as Sarah woke up, she said, "We should call the  
2 police," and so --

3 MR. FREEBURG: Objection, Judge. Hearsay.

4 MS. MARTENS: Your Honor, this is offered for the  
5 effect of the hearer.

6 THE COURT: I would agree and overrule the objection.  
7 This -- the testimony is offered for the impact on the hearer.  
8 Consequently, it's not offered for the truth of the statement.

9 You can go -- you can continue, or you can loop back  
10 to fully respond.

11 THE WITNESS: Okay. What was the question again? I'm  
12 sorry. I forgot.

13 BY MS. MARTENS:

14 Q. All right. I was asking what happened next after you were  
15 woken up?

16 A. Um, yeah. So Hannah said we should call the police, and so  
17 we called the police.

18 Q. Who made that phone call?

19 A. I did.

20 Q. Have you had an opportunity to review the recording of that  
21 phone call?

22 A. Yes, I did.

23 Q. Was it an accurate representation of the conversation from  
24 that morning?

25 A. I believe so.

1 MS. MARTENS: Your Honor, at this time, I'd move for  
2 admission of Government's Exhibit 300, which is the 911 call.

3 MR. FREEBURG: No objection, Judge.

4 THE COURT: Government Exhibit 300 is admitted.

5 (Government's Exhibit 300 received.)

6 MS. MARTENS: Ms. Wait, can you cue that up?

7 (Government Exhibit 300 played.)

8 MS. MARTENS: May I have just a moment, your Honor?

9 THE COURT: Yes.

10 (Government Exhibit 300 played.)

11 **BY MS. MARTENS:**

12 Q. After you called 911, what did you do?

13 A. Um, as roommates, we all were kind of trying to distract  
14 ourselves from what was going on. We were also trying to track  
15 down people she would know, like her mom and things to let them  
16 know what was going on.

17 We watched -- I think we watched a movie. I know we  
18 tried to, and we were trying to wait for more information to  
19 come by. We were waiting for her to come home or getting some  
20 kind of text or call from her.

21 We continued trying to reach out to her.

22 Eventually one of us -- I don't remember which one it  
23 was, but one of us thought of the fact that Snapchat has a like  
24 map my friend function type of thing, if certain settings are  
25 on.

1           So Hannah Egbert checked and saw that Hannah Bye was  
2 in Yellowstone or near Yellowstone. That was the last place  
3 her Snapchat location had pinged her at.

4 Q. And how did that make you feel?

5 A. We were pretty upset --

6           THE COURT: Wait a minute.

7           MR. FREEBURG: Objection.

8           THE WITNESS: Sorry.

9           MR. FREEBURG: Relevance, Judge.

10          THE COURT: Overruled.

11          You may answer.

12 A. We were upset because we had known that this particular guy  
13 had asked Hannah to go camping, and she had specifically told  
14 him no, but that they would be able to go get food at  
15 McDonald's. And she wasn't dressed for camping, so we were  
16 worried about like her safety and her health. So it just -- it  
17 upset us a lot.

18 **BY MS. MARTENS:**

19 Q. So what did you do next?

20 A. We called the police again and let them know that that was  
21 where she was and then we just kept on waiting for either them  
22 to -- like, the police to do something or something to happen  
23 in the national park, or a call or text from Hannah to let us  
24 know that she was okay.

25 Q. Did you ever receive a call or text from Hannah?

1 A. Um, eventually, yes, we did. She texted, the first thing  
2 she texted us was "I'm never online dating begin." And that  
3 immediately told us that something really wrong happened, and  
4 so we, again, called the police to let them know that she had  
5 contacted us.

6 Um, and then we started trying to figure out what to  
7 do next and decided that, like, after consulting with the  
8 police, we were trying to get his license plate number. We  
9 asked Hannah what kind of car he was driving. We found out  
10 what kind of car he was driving, that it was a Florida license  
11 plate and things like that. And so two of us had cars, and we,  
12 like, set up a way that we could --

13 Q. So who had cars?

14 A. I had a car and Brynn Leatham had a car.

15 And so we -- when we're trying to set up a way so that  
16 we could get his license plate, Brynn was in her car on the  
17 street, like, lined up on the street in case he just went past.  
18 I was actually in the parking lot so that I could follow him,  
19 if need be. And Sarah was in the car with me to take the  
20 pictures so that we were safe. And he never came.

21 We found out that through Map My Friends on Snapchat  
22 it kind of -- based on how fast you're moving -- shows whether  
23 you're in a car or whether you're walking and all of a sudden  
24 she was walking. So we went to go find her.

25 It was over near kind of the center of campus. We



1 lived on the south end of campus. So we just kind of -- we  
2 went to go find her. I had Hannah -- sorry, not Hannah -- I  
3 had Sarah in my car and Miranda in my car. Brynn's phone was  
4 dead so she didn't know what was going on until Hannah Egbert  
5 came and told her. And we also had recruited two -- Miranda's  
6 brother and one of his roommates to, like, walk around and try  
7 to get the license plate as well, and so they were both in my  
8 car as well. We picked them up on our way out of the parking  
9 lot to go pick up Hannah.

10 And then we went to -- headed toward the police  
11 station once we picked her up.

12 Q. Once you picked her up -- well, first of all, were you  
13 driving?

14 A. I was, yes.

15 Q. Once you picked her up, did you have any opportunity to  
16 observe her demeanor?

17 A. I was only really able to hear her voice because of where  
18 she got in the car. She was directly behind me, so I couldn't  
19 just, like, look back and see what she looked like,  
20 necessarily. But I can tell you that her voice was panicked,  
21 especially once we told her that we were taking her to the  
22 police station. And also, when we happened to see Cody filling  
23 up his gas tank at the Maverick on the way down past -- or on  
24 Second Street like past -- like going towards the police  
25 station.

1 Q. What happened once you got to -- excuse me.

2 What happened once you got to the police station?

3 A. Once we got there, um, it was a Sunday morning so the  
4 police station was closed, so we had to go out inside like a  
5 side door because we had been in contact with them, they  
6 unlocked the door for us. But they only wanted to talk to  
7 Hannah Bye, even though she expressed an interest in having one  
8 of us in there with her.

9 And so we all waited outside while Hannah was filling  
10 in the rest of what happened to the police officer.

11 Q. I want to back up just a little bit.

12 MS. MARTENS: Ms. Wait, would you display Government  
13 Exhibit 203, which I believe has been previously received in  
14 evidence.

15 **BY MS. MARTENS:**

16 Q. Do you recognize that photo?

17 A. Yes. So that was the reason why Miranda was in my car,  
18 actually. So Miranda and Hannah Egbert were both in the  
19 apartment kind of organizing everything, and the next thing I  
20 know is Miranda is running out of the apartment complex toward  
21 my car without shoes on and she's like, "Hannah just sent me  
22 this Snapchat" -- or she had sent -- she had sent a Snapchat  
23 before. I didn't get a picture of it because Hannah -- or  
24 Miranda had already opened it. Snapchat the pictures are only  
25 available for like ten seconds.

1 But this was what she sent shortly thereafter when  
2 Miranda was already in my car. So this is Miranda's phone and  
3 I had taken a picture of it.

4 Q. So you didn't get the one before?

5 A. I did not.

6 Q. So when you picked her up, we talked a little bit about her  
7 demeanor and you said she sounded panicked.

8 A. Uh-huh.

9 Q. Did her demeanor change at all on the drive to the police  
10 station?

11 A. No, not really. She didn't really want to go to the police  
12 station. She wanted to kind of put everything behind her and  
13 not bother with it. She wanted to kind of forget what  
14 happened. And she never wanted to see Cody again, so she  
15 expressed that in the car, that she never wanted to see Cody  
16 again, and she knew that if she did go to the police, then she  
17 would have to -- potentially have to see him again.

18 But since we had already been in contact with the  
19 police, we were like, "Sorry, you have to go," unfortunately.

20 Q. Did she ever ask for anyone to go into the police station  
21 with her?

22 A. If I'm honest, I don't remember specifically, but I know  
23 that plenty of us had said something, like asked if we should  
24 go in with her, and she seemed like she wanted it, but the  
25 officer wouldn't let us in.

1 Q. Were you with her in the days following?

2 A. So after the police station, she went with the other Hannah  
3 and Brynn to Brynn's house that was like 12 minutes down the  
4 road. And the rest of us went to church. But she did come  
5 back that evening, and we were together that evening and the  
6 next day we were all together.

7 Q. Did you finish your summer semester living together?

8 A. Yes.

9 Q. And during that time did you observe her demeanor?

10 A. Yeah. So Sunday and part of Monday, at least part of  
11 Monday, she was really reserved, she wouldn't really talk to  
12 any of us very much, at least when she was home, like in the  
13 apartment.

14 She mostly stayed in her room which was a little  
15 abnormal for her. She was more social, so she liked to do  
16 things or, like, interact with people. Um, and she just -- she  
17 was very different, very tired, kind of anxious, kind of, you  
18 know, like -- it seemed like she was having a hard time to us.

19 MS. MARTENS: Your Honor, may I have just a moment?

20 THE COURT: Yes.

21 (Discussion held at prosecution table.)

22 MS. MARTENS: I have no further questions for this  
23 witness, your Honor.

24 THE COURT: For the defendant.

25

1 **CROSS-EXAMINATION**

2 **BY MR. FREEBURG:**

3 Q. Good morning, ma'am. My name is Alex Freeburg. I'm one of  
4 Cody Smith's attorneys, and I will be asking you a few  
5 questions, okay?

6 A. Okay.

7 Q. If at any time you can't understand me, please let me know,  
8 all right?

9 A. Yes, sir.

10 Q. So a moment ago you testified that Ms. Bye told you or  
11 indicated to you or you understood from Ms. Bye -- that's the  
12 way it was -- you understood from Ms. Bye that there was no way  
13 she was going to Yellowstone?

14 A. Yes, sir.

15 Q. So you understood the plan was for Mr. Smith to drive two  
16 and a half hours from Yellowstone, meet her at McDonald's and  
17 drive two and a half hours back, and then see her the next day  
18 or not at all?

19 A. So we did not know where he was at at this point. We  
20 didn't know anything --

21 Q. And let's be specific. When you say "we," you're talking  
22 about yourself, right?

23 A. Me and the rest of the roommates.

24 Q. Because you didn't know anything because you weren't part  
25 of any Tinder conversations, right?

1 A. That's correct.

2 Q. So you don't know what Ms. Bye and what Mr. Smith actually  
3 talked about via text message in Tinder; isn't that true?

4 A. That would be correct, yes.

5 Q. And you indicated that Ms. Bye did not want to go to the  
6 police station, right?

7 A. That is correct. She did not want to.

8 (Discussion held between prosecutor and defense counsel.)

9 BY MR. FREEBURG:

10 Q. Isn't it true that Ms. Bye told you that she could handle  
11 herself if he try anything, if Mr. Smith tried anything?

12 A. There was a text, I believe, about it, that -- it does  
13 sound familiar. I don't remember specifically that happening,  
14 but it sounds familiar.

15 Q. I'm going to present to you an exhibit marked as 200, and  
16 it is page 159.

17 I will represent to you that this is -- that this is  
18 data from Ms. Bye's cell phone.

19 And let's look at that first message starting with the  
20 top left column where it says "35266, SMS messages."

21 Do you see that?

22 A. Yes, sorry. I was looking in the wrong spot. Yes.

23 Q. Okay. And let's move from left to right.

24 Do you see a time at 8:32 a.m.?

25 A. Yes.

1 Q. Do you see that there was a text message: "That's okay.

2 Did the dude tried anything?"

3 A. Yes, I see that.

4 Q. And then do you see down below -- let's skip down one text  
5 message where Ms. Bye says, "I will explain when I get back,"  
6 correct?

7 A. That is correct.

8 Q. "I will explain when I get back"; she's not telling you she  
9 needs to go to the police station immediately, right?

10 A. That wasn't what we understood because we had already been  
11 in contact with the police.

12 Q. That's right. You had already contacted the police before  
13 Ms. Bye said to you, "I'll explain when I get back," and  
14 moments later, "Of course he did," meaning of course he tried  
15 something, "But I can definitely handle myself"?

16 A. Yes.

17 Q. She also said she would never go online dating again; isn't  
18 that right?

19 A. That was the text that she had sent us, yes.

20 Q. You saw Snapchat messages from her?

21 A. Yes, I did.

22 Q. And you saw -- well, that Snapchat photograph we first  
23 talked about or that the prosecutor talked about,  
24 Exhibit 203 --

25 A. Yes.

1 Q. -- that's the message where the caption is: "I'm scared"?

2 A. Yes, I believe that was the message.

3 Q. And that caption at least matches her face to you? She  
4 looked scared to you; isn't that true?

5 A. She looks terrified to me.

6 MR. FREEBURG: Judge, may I approach and set up an  
7 exhibit?

8 THE COURT: Yes.

9 BY MR. FREEBURG:

10 Q. I will represent to you that these were photos that there  
11 has been testimony about that they were from Ms. Bye's  
12 Snapchat.

13 Did she send you this photo with the caption: "I am  
14 scared"?

15 A. She did not.

16 Q. Did she send you this photo as part of her Snapchat  
17 messages?

18 A. She did not.

19 Q. How about this photo with the peace sign? Did she also  
20 send that photo to you as part of her Snapchat messages?

21 A. She did not.

22 Q. Isn't it true that if you had seen those photographs from  
23 her by Snapchat, you would not have told her -- if she -- if  
24 you had seen these photographs from her, you would not have  
25 been concerned about her; isn't that right?



1 A. I'm not sure. I only say that because we -- some of us  
2 felt like something was wrong as soon as she stopped responding  
3 to our text messages.

4 So the fact that we felt like something was wrong, um,  
5 like all of us as a collective felt like something was wrong,  
6 um, would have concerned us a little bit. Seeing these  
7 pictures, I don't know what I would have done in the situation  
8 because it wasn't the situation that happened.

9 Q. Let me ask you this: There was text correspondence with  
10 Ms. Bye at approximately 11:47, about ten minutes before the  
11 curfew?

12 A. This is correct.

13 Q. And she told you in the group chat that she was okay at  
14 about ten minutes before the curfew. You remember that, right?

15 A. This is true.

16 Q. If this -- if you had gotten this photo at 12:30 when it  
17 was taken, would you have -- you would not have been concerned  
18 about her being kidnapped, but you may have been concerned  
19 about her violating the curfew; isn't that right?

20 A. I feel like that would be correct. I still would have been  
21 concerned about her health because of how she's dressed.

22 MR. FREEBURG: Thank you, Judge. And if I can have a  
23 moment to look at my counsel.

24 (Discussion held between defense counsel.)

25 MR. FREEBURG: And, Judge, I have no further

1 questions. And I can remove these.

2 THE COURT: All right. Please do.

3 Any redirect from the Government?

4 MS. MARTENS: Yes, your Honor.

5 THE COURT: All right.

6 **REDIRECT EXAMINATION**

7 **BY MS. MARTENS:**

8 Q. Ms. Perkins, so while you were roommates with Ms. Bye, did  
9 you get a pretty good opportunity to get to know her?

10 A. All of my classes were online, so I was always at the  
11 apartment. So whenever she was at the apartment, I was able to  
12 interact with her, yes.

13 Q. Is she -- does she always have emotionally appropriate  
14 responses?

15 A. No, she did not.

16 Q. Can you describe that a little bit?

17 A. So she was 18, and so she would --

18 MR. FREEBURG: Judge, objection. 701, 702, and also  
19 foundation -- well, 701, 702.

20 MS. MARTENS: Your Honor, I can lay a little more  
21 foundation.

22 THE COURT: All right.

23 **BY MS. MARTENS:**

24 Q. So you mentioned that you were at the apartment, and you  
25 spent some time with her.

1 Did you observe her over the course of living with  
2 her?

3 A. Yes.

4 Q. And did you observe her in various events?

5 A. Yes, I believe I did.

6 Q. Did she express happy feelings to you?

7 A. Yes.

8 Q. How about sad feelings?

9 A. Yes.

10 Q. Angry feelings?

11 A. Oh, yes.

12 Q. Did you develop a sense of Hannah as a person and how she  
13 expressed her feelings?

14 A. I felt like I did.

15 Q. So could you describe how it was in your impression that  
16 you felt some of her reactions were sort of socially  
17 inappropriate or didn't necessarily align with how -- what you  
18 might expect folks to express emotions?

19 A. There was a level of immaturity in the cases when she would  
20 be uncomfortable. She would laugh at weird times or try to  
21 make light of a situation that wasn't light. And that was a  
22 pretty often scenario, or a scenario that happened quite often.

23 Q. So maybe the kind of thing where she would smile even  
24 though she wasn't happy?

25 A. Definitely.

1 Q. Laugh at times other people might cry?

2 A. Yeah.

3 MS. MARTENS: Your Honor, I have no further questions  
4 for this witness.

5 THE COURT: All right. Any objection to excusing and  
6 releasing --

7 MR. FREEBURG: No, your Honor.

8 THE COURT: -- Ms. Perkins?

9 Ms. Perkins, thank you very much for your testimony  
10 today. You're excused and released. Safe travels.

11 MS. MARTENS: And, your Honor, just for clarity, this  
12 witness is also under subpoena by the defense. I just want to  
13 make sure we're covering both subpoenas.

14 THE COURT: Any objection to releasing her from the  
15 defendant's subpoena?

16 MR. FREEBURG: No objection, Judge.

17 THE COURT: All right. You're released from both.  
18 Thank you.

19 MS. MARTENS: Thank you, your Honor.

20 THE COURT: The Government may call its next witness.

21 MS. ROMINE: Your Honor, the Government calls Keith  
22 Milks.

23 (Witness sworn.)

24 COURTROOM DEPUTY: Please take a seat.

25 Sir, can you please state and spell your name for the

1 record?

2 THE WITNESS: My name is Keith Alan Milks, K-e-i-t-h  
3 A-l-a-n M-i-l-k-s.

4 KEITH ALAN MILKS, PLAINTIFF'S WITNESS, DIRECT EXAMINATION

5 BY MS. ROMINE:

6 Q. Sir, are you employed?

7 A. I am.

8 Q. Where are you employed?

9 A. I'm a sergeant with the Howe, H-o-w-e, Police Department in  
10 Grayson County, Texas.

11 Q. How long have you been employed there?

12 A. Six years.

13 Q. What's your position?

14 A. I'm a detective.

15 Q. And in that position, what are your duties?

16 A. I investigate violent crimes.

17 Q. Have you received any training for that position?

18 A. Yes, ma'am.

19 Q. Could you summarize that training for the Court.

20 A. Interrogation and interview techniques, crime scene  
21 analysis, evidence collection.

22 MR. FREEBURG: Judge, objection, cumulative.

23 THE COURT: I --

24 MR. FREEBURG: Judge, may I explain? Cumulative to  
25 the stipulation that has been admitted as an exhibit in this

1 case.

2 THE COURT: Thank you for that clarification.

3 Ms. Romine?

4 MS. ROMINE: Your Honor, I don't believe the  
5 stipulation applies to this witness.

6 THE COURT: I'll overrule the objection for now, see  
7 where the scope of the testimony leads us.

8 **BY MS. ROMINE:**

9 Q. Did you become involved in an investigation involving Cody  
10 Smith?

11 A. I wasn't aware of his name until I got here, yes, but, yes.

12 Q. How did you become involved in that investigation?

13 A. An investigator from the National Park Service contacted  
14 our agency and asked us to collect evidence, fingerprints and  
15 biological evidence, DNA evidence, from a Howe resident.

16 Q. And who was that Howe resident?

17 A. Hannah Bye.

18 THE COURT: Sir, you -- your pace of voice is pretty  
19 quick. If you could slow down the speed of your voice.

20 THE WITNESS: I will.

21 THE COURT: Thank you.

22 **BY MS. ROMINE:**

23 Q. Did you ultimately comply with that request to collect  
24 evidence from Ms. Hannah Bye?

25 A. I did.

1 Q. When did that occur?

2 A. We received the request on April 2nd of 2020, and I  
3 fulfilled the request on April 3rd.

4 Q. Is there a general procedure you follow in collecting DNA  
5 evidence?

6 A. Um, it depends on the type of evidence there is. In this  
7 case, they were requesting a buccal swab, which is saliva, hair  
8 follicles, hair strands and fingerprints.

9 I bring the individual in, identify her, make sure she  
10 doesn't eat or drink anything for at least 30 minutes prior,  
11 talk to her for a few minutes to put her at ease, and then I  
12 collect the evidence.

13 I wear sterile gloves. We air dry -- I collect the  
14 buccal swab first with sterile Q-tips, cotton swabs inside of  
15 her cheeks. Let that air dry for ten minutes before I seal it.  
16 Pretty standard.

17 Q. Did you follow that procedure here with Ms. Hannah Bye?

18 A. I did.

19 Q. And did you ultimately collect --

20 MR. FREEBURG: Judge, objection. Cumulative to  
21 paragraph 5 of the stipulation that's been -- I'm sorry, I  
22 misunderstood.

23 THE COURT: Is your objection withdrawn?

24 MR. FREEBURG: It is, your Honor.

25 THE COURT: All right. Could you begin your question

1 again?

2 MS. ROMINE: Thank you.

3 BY MS. ROMINE:

4 Q. Did you ultimately collect DNA evidence from Ms. Hannah  
5 Bye?

6 A. Yes, ma'am.

7 Q. And did you follow that process that you just described?

8 A. Yes, ma'am.

9 Q. How did you verify who you were collecting DNA from?

10 A. Their state-issued Government ID card with a photo.

11 Q. What did you do with that evidence after you collected the  
12 DNA swabs?

13 A. After I collected it, I sealed it for -- to mail it to the  
14 FBI. I locked it in a temporary evidence holding locker, which  
15 is essentially an after-hours locker we keep until our evidence  
16 technician can come in and retrieve it.

17 She came -- this happened on Friday afternoon, so on  
18 Monday she came in. We retrieved it, and that's when we mailed  
19 it off.

20 Q. Who was it mailed off to?

21 A. The FBI lab in Florida.

22 Q. Did you also collect hair follicles?

23 A. I did.

24 Q. I'm sorry?

25 A. Yes, I did.



1 Q. And you briefly discussed the process for doing that. Did  
2 you follow that process with Ms. Hannah Bye?

3 A. I did.

4 Q. What did you do with that evidence after you collected it?

5 A. I -- after I collected the evidence, I put it into a  
6 sterile evidence bag, sealed that bag, and put it in the same  
7 locker.

8 Q. And was the same process followed as far as making sure  
9 that it got to the FBI laboratory that we discussed previously?

10 A. Yes, ma'am.

11 Q. And then, finally, what's the general process when you  
12 collect fingerprints from somebody?

13 A. We make sure they wash their hands. We make sure they  
14 completely dry their hands. We use hand sanitizer, and then we  
15 basically roll their fingers. I think in this case, I wasn't  
16 happy with the way the first set turned out, so I actually did  
17 a second set because one of them was smeared.

18 And so I let those air dry, made sure they were  
19 completely dry before I put those into an envelope and, again,  
20 locked them until we could mail them off.

21 Q. And, again, the same process we discussed before to make  
22 sure they ended up at the correct laboratory?

23 A. Yes, ma'am.

24 MS. ROMINE: Your Honor, may I have one moment?

25 THE COURT: Yes.

1 (Discussion held at prosecution table.)

2 MS. ROMINE: Your Honor, I have no further questions  
3 for this witness.

4 THE COURT: Counsel for defense.

5 MR. FREEBURG: No questions, Judge.

6 THE COURT: Thank you, Sergeant, for your testimony.  
7 Any opposition to excusing and releasing this witness?

8 MS. ROMINE: None from the Government, your Honor.

9 MR. FREEBURG: No, your Honor.

10 THE COURT: You're excused and released.

11 THE WITNESS: Thank you.

12 THE COURT: Thank you.

13 The Government may call its next witness.

14 MS. ROMINE: Your Honor, the Government calls Kimberly  
15 Ley -- your Honor, let me adjust. Actually, I will be calling  
16 Timothy Orr.

17 THE COURT: Oh, all right.

18 (Witness sworn.)

19 COURTROOM DEPUTY: Please take a seat.

20 Sir, would you please state and spell your name for  
21 the record?

22 THE WITNESS: Timothy J. Orr, T-i-m-o-t-h-y, J.,  
23 O-r-r.

24

25

1 TIMOTHY J. ORR, PLAINTIFF'S WITNESS, DIRECT EXAMINATION

2 BY MS. ROMINE:

3 Q. Sir, are you employed?

4 A. Yes.

5 Q. Where are you employed?

6 A. I'm currently a special agent with the FBI's Tampa division  
7 in the Orlando RA.

8 Q. How long have you held that position?

9 A. I've been a special agent since 2008.

10 Q. Have you received any specialized training to hold that  
11 position?

12 A. I have.

13 Q. What -- could you generally summarize the sort of training  
14 you've received?

15 A. I attended the 21-week new agent training, and as an ERT  
16 member, Evidence Response Team, I have participated in multiple  
17 basic and advanced evidence collection training.

18 Q. What is the Evidence Response Team?

19 A. The Evidence Response Team is a group of special agent and  
20 nonspecial agent employees who have received training from the  
21 lab in evidence collection techniques, forensic processes,  
22 crime scene management, things like that.

23 Q. And what is your role on that team?

24 A. I'm the senior team leader.

25 Q. What does that mean?

1 A. So that means that I'm responsible for training the team,  
2 quarterly. I'm responsible for acquiring supplies, ensuring  
3 that they get the required training from the lab. And then,  
4 operationally, I run the searches that we do, the ones that I'm  
5 on scene for.

6 Q. And in that role, did you become involved in an  
7 investigation involving Cody Smith?

8 A. I did.

9 Q. How did you become involved in that investigation?

10 A. In approximate March, Special Agent Nymphgamey Scott from  
11 our Fort Myers RA -- Nymphgamey, N-y-m-p-h-g-a-m-e-y, Scott.  
12 She goes by Nuffy, N-u-f-f-y.

13 Approximately March 18th, she contacted me and  
14 requested ERT assistance to conduct a forensic processing of a  
15 vehicle.

16 Q. And what vehicle were you requested to process?

17 A. That was a 2005 silver Honda Accord.

18 Q. Who was involved in the processing of that vehicle?

19 A. Myself and then we had several ERT members. We had Agent  
20 Shearn -- so Special Agent Jason Shearn. His last name is  
21 S-H-E-A-R-N. We had Special Agent Thuy, T-H-U-Y; Hibbitts,  
22 H-I-B-B-I-T-T-S; Special Agent Dianne Mercurio, D-I-A-N-N-E,  
23 M-E-R-C-U-R-I-O; we had intelligence analyst Tayleen Mussenden,  
24 T-A-Y-L-E-E-N, M-U-S-S-E-N-D-E-N.

25 Q. And when was that car processed?

1 A. That was processed Monday, March 30th of last year.

2 Q. 20 --

3 A. 2020.

4 Q. And during the processing of that vehicle, were photographs  
5 taken?

6 A. Yes.

7 MS. ROMINE: I would like to display to the witness  
8 only exhibits that have been marked.

9 BY MS. ROMINE:

10 Q. Sir, I am going to hand you a series of exhibits that have  
11 been marked for identification purposes as Government Exhibits  
12 613, 614, 615, 616, 617, 618, 619, and 620.

13 BY MS. ROMINE:

14 Q. Sir, do you recognize those photos?

15 A. I do.

16 Q. And how do you recognize those photos?

17 A. Those are photos from the processing of this vehicle.

18 Q. Do they appear to accurately reflect what you observed on  
19 that day when the vehicle was processed?

20 A. They do.

21 MS. ROMINE: Your Honor, Government moves to admit  
22 Exhibits 613 through 620.

23 MR. FREEBURG: Judge, objection as to 619 and 620 for  
24 lack of foundation and relevance, and also an earlier one I  
25 didn't catch the number for.

1 THE COURT: I'm sorry, what earlier one?

2 MR. FREEBURG: Judge, 619, 620 and the one of the door  
3 of the vehicle.

4 THE COURT: I'm sorry, that does not help me.

5 MR. FREEBURG: I can't see the exhibits.

6 Can we please go through them again? Not 616 and not  
7 168.

8 THE COURT: You don't need to think out loud. Are  
9 those your objections, or could you articulate what objection  
10 you're making to what exhibit?

11 MR. FREEBURG: 617, 619 and 620 for lack of  
12 foundation, relevance and prejudice.

13 THE COURT: Ms. Romine, do you wish to ask the witness  
14 any further questions?

15 MS. ROMINE: Your Honor, I believe the proper  
16 foundation has been laid. The relevance is the car was  
17 processed. As to any weight that that evidence may play in the  
18 case, that's ultimately an issue for the jury to resolve.

19 THE COURT: I agree. Those objections are overruled.  
20 As to the prejudice objection, I find that the relevance  
21 outweighs any potential for substantial prejudice.

22 Please proceed.

23 MS. ROMINE: Your Honor, may --

24 THE COURT: Actually, perhaps maybe this might be a  
25 good time to take a break. Would that be all right?

1 MS. ROMINE: Yes, Your Honor, sure.

2 THE COURT: There's never any good time.

3 We'll stand in recess until 10:20. Please remember  
4 the admonition against discussing this case with anyone or  
5 doing any research about this case or this type of case.  
6 Please keep an open mind until all the evidence is in.

7 Again, we will stand in recess until 10:20.

8 (Following out of the presence of the jury.)

9 THE COURT: Anything requiring my attention?

10 MS. ROMINE: Nothing from the Government, Your Honor.

11 MR. FREEBURG: No, Judge, nothing from us. Thank you.

12 THE COURT: All right. Thank you.

13 (Recess taken 10:03 a.m. until 10:26 a.m..)

14 (Following in the presence of the jury.)

15 THE COURT: Please be seated.

16 Docket 20-CR-45, the Court notes the presence of the  
17 jury with roll call waived.

18 Agent Orr, you remain under oath.

19 THE WITNESS: Yes, Your Honor.

20 THE COURT: Ms. Romine.

21 MS. ROMINE: Thank you, Your Honor.

22 **BY MS. ROMINE:**

23 Q. Sir, before we discuss those photos I want to back up a  
24 bit. I think in spelling some names it looks like we may have  
25 missed some people.

1 Did we miss anybody that was involved in the  
2 processing of the vehicle?

3 A. I'm not sure if I mentioned Tiffany Gorman. She's an IA,  
4 intelligence -- I'm sorry -- a forensic accountant who  
5 conducted the photography. And Special Agent Lynne Billings  
6 was involved at the scene of the house, and she escorted the  
7 vehicle back to the Tampa office where our equipment  
8 specialist, Richard Geary, G-E-A-R-Y, operated the tow truck  
9 and actually transported the vehicle to our office.

10 Q. Thank you.

11 THE COURT: Ms. Romine, could you move the microphone.  
12 I don't know why it keeps -- it is not like anyone speaks that  
13 low.

14 Thank you.

15 MS. ROMINE: Your Honor, move to publish Government  
16 Exhibits previously admitted 613 through 620.

17 THE COURT: Certainly.

18 MS. ROMINE: Ms. Wait, could we publish Exhibits 613,  
19 614, 625.

20 THE COURT: I think I overruled the objection, but the  
21 Exhibits 613, 614, 615, 616, 617, 618, 619 and 620 are  
22 admitted.

23 (Government's Exhibits 613, 614, 615, 616,  
24 617, 618, 619, 620 received.)

25 MS. ROMINE: Thank you, Your Honor.



1 THE COURT: Thank you for that reminder.

2 BY MS. ROMINE:

3 Q. Special Agent Orr, what do those photos depict?

4 A. This is the 2020 Honda Accord that we processed on March  
5 30th.

6 Q. And that was the car that, based on your understanding,  
7 belonged to Mr. Cody Smith?

8 A. Yes.

9 MS. ROMINE: Could we please publish Government  
10 Exhibit 616?

11 BY MS. ROMINE:

12 Q. What does that depict?

13 A. This is the interior of the front passenger side of the  
14 vehicle.

15 Q. Moving on to Government Exhibit 617, what does that depict?

16 A. This appears to be the inside of the driver's door.

17 Q. Moving on to Government Exhibit 618, what does that depict?

18 A. This is the interior of the trunk.

19 Q. And what sort of items were found in the trunk?

20 A. There were blankets, towels, a backpack with clothing in  
21 it. There was a tent. As you can see, the charcoal  
22 briquettes.

23 Q. Were any items seized from the trunk?

24 A. The tent. And we seized hair from inside the backpack.

25 Q. Moving on to Exhibit 619, what does that depict?

1 A. That was a pocket knife.

2 Q. Where was that knife located?

3 A. As I recall, that knife was located in the driver's door.

4 Q. And based on the ruler, how long does the base of that  
5 pocket knife appear to be?

6 A. It appears to be about 120 centimeters.

7 Q. Moving on to Government Exhibit 620, what does that photo  
8 depict?

9 A. It is the same knife, unfolded.

10 Q. And, again, based on the ruler on the photo, how long does  
11 the blade of that knife appear to be?

12 A. It appears to be about 200 centimeters -- the blade is  
13 approximately -- sorry. I'm having a hard time reading the  
14 numbers.

15 So approximately 80 centimeters.

16 Q. And just so we're clear, is that the same knife also  
17 pictured in Government Exhibit 619?

18 A. Yes.

19 Q. Other than taking photos of the vehicle and seizing  
20 evidence, what sort of processing was done by your team?

21 A. We processed the vehicle for trace evidence, for latent  
22 fingerprints, and for DNA.

23 Q. And did you collect trace evidence?

24 A. We did.

25 Q. What is trace evidence?

1 A. So trace evidence can be a variety of things. The common  
2 characteristics of trace evidence are that it is usually fairly  
3 small and it is easily transferable. So common examples of  
4 trace evidence would be hairs, fibers, soil, rope, so cut ends  
5 of rope, things like that, fabric, those types of things,  
6 building materials made from soil, like concrete, things like  
7 that could constitute trace evidence.

8 Q. Focusing on latent prints, how are latent prints collected?

9 A. First, we visually search the surface. We identify the  
10 latent fingerprints. If it is on a nonporous surface, such as  
11 metal, plastic or glass, oftentimes we will treat it with  
12 cyanoacrylate fuming which is basically where we will heat what  
13 is commonly known as super glue until it becomes a vapor and as  
14 the vapors are attracted to the moisture in the fingerprints,  
15 it makes it more durable.

16 And once we super glue fume it, we can apply  
17 fingerprint powder and once the powder is applied we can lift  
18 it with such as tape or items we call gel lifters, things like  
19 that, that are adhesive enough to pull the powder without  
20 damaging the prints.

21 Q. And where were prints collected from?

22 A. From the driver's side door exterior, from the exterior of  
23 the passenger side door, from under the door handles, and from  
24 the dashboard.

25 Q. And I believe you indicated that you also collected DNA; is

1 that correct?

2 A. Yes.

3 Q. And what is the process for collecting DNA?

4 A. So for DNA we use, obviously, we wear protective equipment,  
5 Tyvek suits, the white suits that you might have seen, clean  
6 gloves and we swab the areas that are likely to contain DNA;  
7 textured areas. Areas, for example, in a vehicle we would  
8 focus on areas that were most likely touched: door knobs,  
9 window controls; visors; the seat belt; where your head rests,  
10 things like that.

11 Q. And how many DNA samples did you collect?

12 A. I believe we collected 17 swabs.

13 Q. And of all the evidence that you collected -- so the trace  
14 evidence, the latent prints, the DNA in the tent -- what  
15 happened with those items?

16 A. So those items are packaged. They are then entered into  
17 our evidence control room in Tampa and from there the case  
18 agent coordinates with the laboratory to request examinations.

19 Q. And is that what occurred in this case?

20 A. Yes.

21 Q. Was there anything different about the processing of this  
22 vehicle that maybe wouldn't be the same if it happened a year  
23 before?

24 A. So this was March of 2020. This was, I believe, the first  
25 search that we did under the COVID protocols, and so normally

1 we would have eight people. We tried to limit it to six. We  
2 tried to socially distance while we conducted the search,  
3 things like that.

4 Fortunately it was a small vehicle, so really two  
5 searchers at a time, but a lot of it was COVID protocol, so  
6 face masks, temperature checks, social distancing, things like  
7 that.

8 MS. ROMINE: Your Honor, may I have one moment?

9 THE COURT: Yes.

10 (Discussion held at prosecution table.)

11 MS. ROMINE: Your Honor, Government has no further  
12 questions for this witness.

13 THE COURT: All right.

14 Any questions for defendant?

15 MR. FREEBURG: Yes, Your Honor.

16 CROSS-EXAMINATION

17 **BY MR. FREEBURG:**

18 Q. Sir, my name is Alex Freeburg. I will be asking you  
19 questions on behalf of the defendant, Mr. Smith. If at any  
20 time I ask you a bad question, you don't understand something,  
21 let me know, okay?

22 A. Okay.

23 Q. You said you used a Tyvek suit?

24 A. Yes.

25 Q. Can you describe a Tyvek suit?

1 A. So it's an over suit, it is a thin white material that we  
2 use to cover ourselves. Before we go into an area where we're  
3 going to collect DNA or trace evidence.

4 Q. So why is it important to cover yourselves when you go into  
5 an area to collect DNA?

6 A. So that we don't leave our own and so that we don't  
7 carry -- basically we operate under Lochard's where --  
8 L-O-C-H-A-R-D's, principle of exchange where when two items  
9 comes together, there's a transfer of material, often. And so  
10 we don't want to leave any of ourselves on the scene and we  
11 don't want to pick up any of the scene on to ourselves.

12 Q. And is that how you were trained at the FBI to collect  
13 evidence?

14 A. Yes.

15 Q. Were you trained at FBI to collect DNA at the back of a  
16 pickup truck without wearing any sort of Tyvek suit?

17 A. That would not be consistent with our training.

18 Q. Would that be sloppy?

19 A. It depends on the circumstances. I don't know the  
20 circumstances of the hypothetical.

21 MR. FREEBURG: Judge, a moment with my co-counsel?

22 THE COURT: All right. Thank you.

23 (Discussion held between defense counsel.)

24 MR. FREEBURG: Nothing further, Your Honor.

25 THE COURT: Any redirect?

1 MS. ROMINE: No, Your Honor.

2 THE COURT: Any objection to excusing and releasing  
3 this witness?

4 MS. ROMINE: None from the Government.

5 MR. FREEBURG: None from the defense, Your Honor.

6 THE COURT: Thank you, Agent.

7 THE WITNESS: Thank you, Your Honor.

8 THE COURT: You're excused and released from your  
9 subpoena. We appreciate your travel and testimony here today.  
10 The Government may call its next witness.

11 MS. ROMINE: The government calls Kimberly Ley.

12 (Witness sworn.)

13 THE CLERK: Can you please state and spell your name  
14 for the record?

15 THE WITNESS: My name is Kimberly Ley, that's spelled  
16 K-i-m, last name L-e-y.

17 **KIMBERLY LEY, PLAINTIFF'S WITNESS, DIRECT EXAMINATION**

18 **BY MS. ROMINE:**

19 Q. Are you employed?

20 A. I am, yes.

21 Q. Where are you employed?

22 A. I am currently employed at the Wyoming State Crime  
23 Laboratory.

24 Q. What's your position there?

25 A. I'm a forensic analyst within the biology unit.

1 Q. How long have you held that position?

2 A. I've held that position since February of 2016.

3 Q. What are your responsibilities as a forensic analyst at the  
4 Wyoming State Crime Lab?

5 A. So my duties and responsibilities include receiving items  
6 of evidence. I examine those items of evidence for the  
7 presence of biological evidence, and then I process that  
8 evidence for DNA. I issue reports and, if requested, I come to  
9 court and testify to my findings.

10 Q. Have you held any other positions at the State Crime Lab?

11 A. Yes, so my senior and junior year of college I actually  
12 served as an intern within the biology unit of State Crime and  
13 in July of 2020 I was appointed the Alternate CODIS  
14 Administrator for the State of Wyoming.

15 Q. Have you received any specialized training for your current  
16 position as a forensic analyst?

17 A. I have, yes.

18 Q. Could you summarize that training for the Court.

19 A. Once you are employed with the Wyoming State Crime Lab as a  
20 DNA analyst, you are required to complete a formal training  
21 program in order to do this job. What that includes is  
22 examining practice items of evidence, mock evidence, reading  
23 articles relevant within the field. Of course then you're --  
24 your comprehension of that knowledge is then tested through  
25 oral, written and practical examination.



1 Q. Have you personally performed procedures specific to  
2 forensic serology and DNA analysis?

3 A. I have, yes.

4 Q. What is your educational background?

5 A. I have an Associate's from Laramie County Community College  
6 in science and I also have a Bachelor's in Science from the  
7 University of Wyoming.

8 Q. Do you have any continuing education requirements to hold  
9 your current role?

10 A. Yes. We are required to complete, at minimum, eight hours  
11 of continuing education every year.

12 Q. What's a proficiency test?

13 A. A proficiency test is a way that an accredited  
14 organization, such as the Wyoming State Crime Lab, monitors and  
15 evaluates performance and the quality of our work. Those tests  
16 are typically distributed by an accredited provider to our  
17 organization.

18 Q. How many proficiency tests have you taken?

19 A. Thirteen.

20 Q. Have you ever failed any of them?

21 A. I have not.

22 Q. Have you taught or lectured in the areas of forensic  
23 serology or forensic DNA analysis?

24 A. I have given some presentations at the local level to  
25 students but not at the academia level.

1 Q. And have you ever testified in court regarding those topics  
2 before?

3 A. Yes, I have.

4 Q. We have mentioned the word "serology." What is it?

5 A. Serology is the study of body fluids.

6 Q. What's the process to screen for body -- bodily fluids?

7 A. So at the Wyoming State Crime Lab we have presumptive and  
8 confirmatory tests for human blood, seminal fluid, urine and  
9 saliva. So depending on what fluid you're looking for, you may  
10 have some different procedures that you use.

11 To begin with, if you're looking for, say, blood or  
12 seminal fluid, or saliva or urine, we do have a piece of  
13 equipment, it is called an alternate light source, or ALS for  
14 short. It looks like a black light. But in a more scientific  
15 way it allows us to see stains that might not be visible to  
16 your naked eye.

17 It narrows down those areas of staining that we need  
18 to then proceed with what's called presumptive testing. So  
19 presumptive testing is called presumptive testing for that  
20 reason; that it just indicates whether or not an area of  
21 staining may or may not be the fluid that you're looking for,  
22 right?

23 So then, once we have a positive presumptive result,  
24 then we carry out confirmatory tests for seminal fluid and  
25 human blood.

1 Q. We also briefly discussed DNA. What is DNA?

2 A. DNA stands for deoxyribonucleic acid. In simple terms it  
3 is the blueprint on how to make a living organism. It also  
4 provides the instructions on how an organism is to carry out  
5 its day-to-day functions.

6 Q. And in your role as a forensic analyst, where can DNA be  
7 found?

8 A. In your cells.

9 Q. Is it possible for people to leave their DNA on objects?

10 A. It is, yes.

11 Q. How durable is DNA evidence?

12 A. The longevity of DNA depends on the environment in which it  
13 is in. The more the environment has its effects on it -- so  
14 water, UV, sun, heat -- all those things can affect the ability  
15 to -- for DNA to persist within the open environment. Of  
16 course within your cells it is very stable. But once it is  
17 subjected to outside forces, those forces can be variable on  
18 how much they affect the DNA.

19 Q. How about passage of time?

20 A. Yes.

21 Q. What's a DNA profile?

22 A. A DNA profile is a series of numbers like a bar code;  
23 that's what a DNA profile looks like that we use.

24 Q. How is a DNA profile developed?

25 A. So it takes some steps to get to the actual series of

1 numbers, however in a simple sense, the first thing we do is  
2 extract the DNA from the cells. We then quantify the DNA so we  
3 determine approximately how much DNA is present in a sample,  
4 and then we amplify that DNA.

5           So we make many, many copies of that DNA within a  
6 sample, and then we -- the last step is applying it to the  
7 genetic analyzer which gives us the numbers or the bar code  
8 that we use in a DNA profile.

9 Q. Can two people share the same DNA?

10 A. If you're identical twins.

11 Q. Any circumstances where two people can have the same DNA?

12 A. You may not have the same identical DNA profile, but of  
13 course relatedness, just because you pass on your genetic  
14 material to your offspring, so they're not completely identical  
15 but you do share your genetic material with your offspring  
16 and -- your relatives.

17 Q. After developing a DNA profile, what are some conclusions  
18 you can learn from that?

19 A. So one thing we can do is evaluate the profiles for  
20 comparison suitability. Some profiles are just not suitable  
21 for comparison. If a profile is determined to be suitable for  
22 comparison, then we compare question profiles, DNA profiles, to  
23 what's called a reference sample, so those are samples that are  
24 taken from an individual. Another word we use for them is  
25 "knowns" because they're coming from a known individual. We

1 compare those known reference samples to these profiles and an  
2 inclusion or an exclusion can be made at that point.

3 Q. And focusing on suitability of DNA for comparison, whether  
4 or not DNA is suitable, is that tied to some of the factors  
5 that we discussed before?

6 A. Correct. And also how much is detected.

7 Q. So the more DNA, the easier it is to do a comparison?

8 A. Not necessarily because we do have a situation where if you  
9 get too much DNA from too many contributors, it would be  
10 uninterpretable due to complexity.

11 Q. What's a likelihood ratio?

12 A. So anytime an accredited -- we are an accredited laboratory  
13 at the Wyoming State Crime Lab. So anytime an inclusion or  
14 association is made between a reference sample and a question  
15 sample, we are required to generate a statistic. And that  
16 statistic is the likelihood ratio.

17 The likelihood ratio provides us with a strength or  
18 weight of how likely it is that the observed profile that we're  
19 seeing in a questioned item originated from a person of  
20 interest, compared to if it originated from random, unknown,  
21 unrelated individuals.

22 Q. How do you determine that statistic?

23 A. We have a computer program that helps us do that. Of  
24 course, it is based off of math -- well-established  
25 mathematical equations that are used within the program to

1 calculate that out.

2 Q. Is it possible to have DNA from more than one person in a  
3 sample that you're analyzing?

4 A. Yes.

5 Q. How do you know the results that you find based on your  
6 analysis and testing are reliable?

7 A. So reliability begins with validation. So long before we  
8 at the laboratory implement any method of testing, it goes  
9 through what's called a validation process. And what that does  
10 is it determines the reliability of the test. It determines  
11 the limitations of the test; what the ranges of that test are  
12 going to be.

13 Another level of reliability that has been included  
14 within our work process is we do perform audits, internal and  
15 external, of our results and our procedures and our policies.  
16 We have quality control measures within our testing, and we  
17 also, lastly, have a 100 percent technical review of all of our  
18 results.

19 So what that means is another qualified analyst takes  
20 a look at all of my results and evaluates them for accuracy and  
21 reliability as well.

22 Q. You previously discussed that your lab is accredited. Does  
23 it currently hold an accreditation?

24 A. Yes, we do.

25 Q. And did it hold an accreditation when you performed the

1 analysis that we're going to discuss here in a bit?

2 A. Yes.

3 Q. Beyond that accreditation, is there any additional  
4 standards that the DNA Casework Unit is held to?

5 A. We are. In addition to being accredited through our  
6 laboratory accreditation, the Forensic Biology Unit at the  
7 Wyoming State Crime Lab also follows the FBI quality assurance  
8 standards.

9 Q. Did the Wyoming State Crime Lab examine any evidence  
10 pertaining to the case that we're here on today?

11 A. Yes, we did.

12 Q. What items did the laboratory or the crime lab examine in  
13 this case?

14 A. We were provided a bra, a pair of underwear, a sweatshirt,  
15 and a pair of shorts.

16 MS. ROMINE: Could we publish Government Exhibit 603?

17 BY MS. ROMINE:

18 Q. Do you recognize that item?

19 A. Yes.

20 Q. Is that one of the items that the crime lab examined?

21 A. Yes, this was Wyoming -- this was crime laboratory Item No.  
22 1, the bra.

23 Q. What kind of examination was performed on this item?

24 A. When these items were submitted, per agency request, we  
25 were requested to screen these items of clothing for the

1 presence of potential seminal fluid and, in this case, for this  
2 item, we did examine it for the possible presence of seminal  
3 fluid, as well as swabbing the exterior and interior surfaces  
4 of this item due to some alleged groping of the victim that may  
5 have occurred.

6 Q. And what were the results of your examination?

7 A. For the serology results, so there was no indication of  
8 seminal fluid on this item. Using the ALS there was no stains  
9 that were present that needed to be tested, so visually it  
10 tested negative for seminal fluid.

11 Q. Could we publish Government Exhibit 604? Do you recognize  
12 that item?

13 A. Yes, this would be crime laboratory Item No. 2, which is  
14 the pair of underwear.

15 Q. Moving on to Government's Exhibit 605. What's the marking  
16 on that photo?

17 A. So the marking on that photo, the circle indicates the area  
18 where the ALS, or that light source that I spoke about earlier,  
19 fluoresced; a stain was glowing there.

20 Again, we can't see these stains with our naked eye or  
21 visually, so we apply the circle around so that's where the ALS  
22 positive verbiage is written on that.

23 AP negative, that is the presumptive test for seminal  
24 fluid. So what that means is it was swabbed but did not  
25 indicate a positive result.



1 Q. Moving on to Government's Exhibit 606. Could you explain  
2 the markings on that photograph?

3 A. Yes. So the five areas that are circled on the back side  
4 of this item, same thing. Those were areas that, using the  
5 ALS, indicated there was some staining there that needed to be  
6 presumptively tested for the presence of seminal fluid.  
7 However, all of those presumptively tested negative for the  
8 presence of seminal fluid.

9 Q. I think we've discussed this -- you can take that down. I  
10 think we discussed this, but I want to make sure I understand.

11 So on the pair of underwear, what tests were all  
12 performed?

13 A. On the pair of underwear, we examined it with the alternate  
14 light source and we presumptively tested for the presence of  
15 seminal fluid.

16 Q. And all of those results were negative?

17 A. Negative. ALS was positive, of course, because it did  
18 indicate an area of staining, but it presumptively tested  
19 negative for seminal fluid.

20 Q. Please publish Government's Exhibit 607.

21 Do you recognize this item?

22 A. Yes, this would be crime laboratory Item No. 3, the  
23 sweatshirt.

24 Q. What's that paper bag?

25 A. That's actually the container that it came to the crime lab

1 in.

2 Q. Moving on to Government's Exhibit 608, do you recognize  
3 that item?

4 A. Yes, it is also the sweatshirt.

5 Q. Was that item examined by the crime lab?

6 A. Yes, it was.

7 Q. And what tests were performed?

8 A. So we examined it with the ALS and we also did some  
9 presumptive testing for seminal fluid. However, it tested  
10 negative for seminal fluid.

11 Additionally, on this item, this is one of those items  
12 that was requested that the outside chest area of the sweater  
13 be swabbed for DNA due to the alleged groping that may have  
14 occurred.

15 Q. And what was the result of that?

16 A. We did perform DNA testing on that sweatshirt. It  
17 indicated that it was a mixture of -- assumed to be from three  
18 contributors. There was one distinct profile that was detected  
19 that was consistent with Hannah Bye.

20 What that means is that when we say it's a distinct  
21 mixture, that means that one person in particular contributed  
22 more DNA in that sample. And that was Hannah Bye.

23 Then we did a statistical analysis of that profile,  
24 and it was 1.81 million times more likely that the profile that  
25 we generated off of those swabs from that sweatshirt originated

1 from Hannah Bye, Cody Smith, and an unrelated individual than  
2 if it originated from three unknown unrelated individuals.

3 And so that is very strong support in favor of the  
4 hypothesis that it originated from Hannah Bye, Cody Smith, and  
5 an unknown individual.

6 Q. And, again, so we're clear, that's not seminal fluid; that  
7 is touch DNA? Would that be an appropriate way to frame it?

8 A. Transfer DNA.

9 MS. ROMINE: Please publish Government's Exhibit 609.

10 BY MS. ROMINE:

11 Q. Do you recognize that item?

12 A. Yeah, That is laboratory Item No. 4, the shorts.

13 MS. ROMINE: Please publish Government's Exhibit 610.

14 BY MS. ROMINE:

15 Q. Do you recognize that item?

16 A. Yes, it is the shorts.

17 Q. Could you explain the markings on the shorts in that  
18 photograph?

19 A. So those are the four areas that, using the ALS, indicated  
20 some areas of staining that needed to be presumptively tested.  
21 We presumptively tested those four areas for the presence of  
22 seminal fluid. All four areas tested negative.

23 Q. And other than that examination, did you perform any  
24 examinations on that item?

25 A. No.

1 Q. Let's discuss trace DNA just a little bit more.

2 When we're talking about the durability of DNA before,  
3 was that in reference to trace DNA?

4 A. It can be, yes, just because you do have transient transfer  
5 of DNA throughout your day-to-day activities.

6 Q. Were there specific concerns when it comes to the  
7 durability of trace DNA?

8 A. Yes.

9 Q. What are those concerns?

10 A. Well, when it's out in the open in the environment, of  
11 course, it's being exposed to heat, sun, potentially water, all  
12 of the environmental demands that is outside the body.

13 So anytime it's exposed to those types of things, it  
14 can degrade and potentially not be present.

15 Q. And does the nature of trace DNA also change based on the  
16 item that the DNA is making contact with?

17 A. It can, yes.

18 Q. So, for instance, when I touch this pen, do I leave trace  
19 DNA?

20 A. Presumably.

21 Q. When I touch my jacket, do I leave trace DNA?

22 A. You can, yes.

23 Q. And when I touch this piece of paper, can I leave trace  
24 DNA?

25 A. You can, yes.

1 Q. And could the amount of DNA that I leave behind on those  
2 three items be different based on the nature of those objects?

3 A. On the nature of those objects or how often or how hard you  
4 touched the items previously before you touched the subsequent  
5 item, yes.

6 Q. Are there certain objects that hold trace DNA better than  
7 other objects?

8 A. Ones that, obviously, have some texture can hold DNA or  
9 have a larger transfer than, say, a smooth object. So, yes.

10 MS. ROMINE: Your Honor, may I have one moment?

11 THE COURT: Yes.

12 (Discussion held at prosecution table.)

13 MS. ROMINE: Your Honor, I have no further questions  
14 for this witness.

15 THE COURT: All right.

16 Questions from defendant?

17 MR. FREEBURG: Yes, Your Honor.

18 **CROSS-EXAMINATION**

19 **BY MR. FREEBURG:**

20 Q. Okay, ma'am, my name is Alex Freeburg. I will be asking  
21 you a few questions on behalf of Cody Smith.

22 A. Nice to meet you.

23 Q. There was no seminal fluid on the back side of the shorts  
24 you analyzed?

25 A. Correct. It tested negative presumptively for the presence

1 of seminal fluid.

2 Q. And seminal fluid, we mean semen, of course; isn't that  
3 right?

4 A. Correct.

5 Q. The sweatshirt that you discussed, the sweatshirt you  
6 analyzed was a black sweatshirt?

7 A. Yes.

8 Q. Is it possible if someone is wearing a black sweatshirt and  
9 then another sweatshirt from another individual on top of that  
10 black sweatshirt that there could be trace DNA passed between  
11 those two sweatshirts?

12 A. It could happen, yes.

13 MR. FREEBURG: Judge, can I have a moment with  
14 co-counsel?

15 THE COURT: Yes.

16 (Discussion held between defense counsel.)

17 MR. FREEBURG: No further questions, Judge.

18 THE COURT: All right. Any redirect?

19 MS. ROMINE: No, Your Honor.

20 THE COURT: Any objection to releasing and excusing  
21 the witness?

22 MS. ROMINE: None from the Government.

23 THE COURT: From the defendant.

24 MR. FREEBURG: None from the defense.

25 THE COURT: All right. Thank you very much for your

1 testimony today. You're excused and released.

2 The Government may call its next witness.

3 MS. ROMINE: Your Honor, the Government calls Dyanne  
4 Carpenter.

5 (Witness sworn.)

6 COURTROOM DEPUTY: Please take a seat.

7 Ma'am, can you please state and spell your name for  
8 the record.

9 THE WITNESS: Yes. My name is Dyanne Carpenter. My  
10 first name is spelled D-y-a-n-n-e, my last name is spelled  
11 C-a-r-p-e-n-t-e-r.

12 **DYANNE CARPENTER, PLAINTIFF'S WITNESS, DIRECT EXAMINATION**

13 **BY MS. ROMINE:**

14 Q. Are you employed?

15 A. Yes, I am.

16 Q. Where are you employed?

17 A. By the Federal Bureau of Investigation.

18 Q. What's your position?

19 A. I am a physical scientist, forensic examiner in the latent  
20 print operations unit at the FBI laboratory which is located in  
21 Quantico, Virginia.

22 Q. How long have you held that position?

23 A. Approximately ten-and-a-half years.

24 Q. What's your official duties?

25 A. I receive inventory, examine and process items of evidence

1 for the development of latent prints. I then compare those  
2 latent prints to known prints, to other latent prints, or  
3 search them through the FBI's automated fingerprint database.  
4 I write reports based on the results of my conclusions and  
5 testify in court when requested to do so.

6 Q. What's your educational background?

7 A. I have a Bachelor's of science in chemistry from the  
8 University of Pittsburgh located in Pittsburgh, Pennsylvania.  
9 I have a Master's of science in forensic science from Virginia  
10 Commonwealth University located in Richmond, Virginia.

11 Q. What kind of training do you have in the area of  
12 fingerprints and footprints?

13 A. I received my training at the FBI laboratory in the latent  
14 print operations unit where I'm currently employed. My  
15 training program was approximately 18 months long, and I was  
16 trained in the biology of friction ridge skin.

17 I learned how to properly record and compare inked  
18 known prints, how to properly handle and process items of  
19 evidence, and how to develop and compare latent prints.

20 Throughout the course of my training, I processed  
21 hundreds of items of evidence and completed approximately  
22 100,000 comparisons. I also completed oral boards, moot courts  
23 and comparison tests.

24 For approximately 12 months of my 18-month program, I  
25 worked cases under the supervision of a qualified examiner.



1 Upon completion of my training, I successfully completed the  
2 FBI's comprehensive competency exam in the area of friction  
3 ridge analysis.

4 Q. Have you testified in court before regarding the duties  
5 that you previously discussed?

6 A. Yes, I have.

7 Q. You've brought up the idea of latent prints. What are  
8 latent prints?

9 A. So first I need to note that on the underside of the hands,  
10 the palms of the hands and the soles of the feet is a  
11 specialized type of skin, which is known as friction ridge  
12 skin. It consists of raised portions, which are called ridges,  
13 and valleys in between, which are called furrows.

14 A latent print is the reproduction of the friction  
15 ridge arrangement on the underside of the hand from the end  
16 joint to the tip. And it is on a substrate, excuse me, or a  
17 surface, left behind in some kind of matrix or a substance that  
18 might be coating the friction ridge arrangement.

19 Latent prints are not always visible to the naked eye  
20 and may require some additional processing, such as powders or  
21 chemical processes, in order to become visible.

22 Q. What is a known print?

23 A. A known print is the intentional recording, reproduction of  
24 the friction ridge arrangement on the underside of the hand  
25 from the end joint of the finger to the tip and is generally

1 taken by taking the finger and rolling it from nail to nail in  
2 a thin layer of black printer's ink and then rolling again from  
3 nail to nail on a contrasting background, such as a white  
4 fingerprint card.

5 This is done to create a permanent record. The  
6 friction ridge arrangement can also be recorded digitally using  
7 a method called BioScan in which the fingers are placed on a  
8 flatbed scanner, and the friction ridge arrangement is recorded  
9 digitally.

10 Q. What are the basic factors in the use of fingerprints as a  
11 means of identification?

12 A. The basic factors which allow for the use of fingerprints  
13 as a means of identification are persistence and uniqueness.  
14 The friction ridge arrangement is persistent in that it is  
15 formed before birth in utero and stays in the same arrangement  
16 throughout life until after death and decomposition, barring  
17 any permanent scarring or disease.

18 The fingerprints are unique in that the friction ridge  
19 arrangement is not repeated from person to person or finger to  
20 finger even with identical twins.

21 Q. What is the process for print comparison?

22 A. The process that we use for fingerprint comparison is known  
23 as ACE, Or A-C-E. It stands for analysis, comparison and  
24 evaluation.

25 Analysis is the information-gathering, phase and in

1 analysis, I'm going to look at the print and look at all of the  
2 information present in the print to include the overall pattern  
3 type and the individual ridge flows.

4 In comparison, I'm going to place the latent print and  
5 the known print side by side and systematically compare the  
6 information present in the latent print to the information  
7 present in the corresponding area of the known print, looking  
8 for agreement and disagreement.

9 The third step is evaluation. And this is the  
10 decision-making step. In evaluation, I'm going to come to one  
11 of three conclusions: Identification, or that the latent print  
12 and the known print came from the same source; exclusion, or  
13 that the latent print and the known print came from different  
14 sources; or inconclusive, which in most cases means that there  
15 is not enough quality or quantity of information present in the  
16 known print for me to either identify or exclude.

17 Q. Did you perform any examinations relevant to the case that  
18 you appear in this court for today?

19 A. Yes, I did.

20 Q. What item -- what did you examine?

21 A. I examined a tent, a bag of tent accessories. I received  
22 three sets of known fingerprints and one set of known  
23 footprints and nine latent lifts.

24 Q. Who were the known prints from?

25 A. I received known fingerprint cards from Hannah Bye, Tammy

1 Smith and Jordan Smith, and I received known footprints of  
2 Hannah Bye.

3 Q. You indicated that you received nine latent prints.

4 A. Nine latent lifts.

5 Q. Lifts. Where did those lifts come from?

6 A. To the best of my recollection, they came from the Honda  
7 Accord, I believe it was. Three lifts were from the driver's  
8 side door, the exterior. Five, I believe, were from the  
9 passenger side door exterior. And one was from the dashboard  
10 of the inside of the car, I believe.

11 Q. What were the results of your examination of the latent  
12 prints from the vehicle?

13 A. I examined the latent lifts from the vehicle, and I also  
14 examined the electronic images taken of those areas -- areas,  
15 excuse me, prior to those lifts being taken, and there were no  
16 latent prints suitable for comparison from those lifts.

17 Q. I believe you also indicated that you examined a tent and a  
18 bag of tent accessories; is that correct?

19 A. Yes, that's correct.

20 Q. And what did your examination reveal from those items?

21 A. I processed the tent, looking for the development of latent  
22 prints. From the tent, I found 13 latent prints suitable for  
23 comparison. 12 of those latent prints were latent footprints,  
24 and one latent print was a latent impression, which in this  
25 case indicates it was either a palm print or a footprint.

1 Q. And did you compare the latent prints from the tent to your  
2 known samples?

3 A. Yes, I did.

4 Q. What was the result?

5 A. Of the 13 latent prints from the tent, four latent  
6 footprints were excluded as prints of Hannah Bye. The  
7 remaining eight latent footprints and one latent impression  
8 were inconclusively compared, which, again, means I did not  
9 have enough information present in the known print to be able  
10 to conclusively compare those prints.

11 Q. When did you perform your examination of the tent in this  
12 case?

13 A. It was July and August of 2020.

14 Q. Is it surprising to you that you weren't able to match any  
15 prints from the tent?

16 MR. FREEBURG: Objection, Judge. Relevance as to the  
17 surprise.

18 THE COURT: I -- do you wish to restate your question?

19 MS. ROMINE: I will rephrase, Your Honor.

20 THE COURT: Thank you.

21 BY MS. ROMINE:

22 Q. Let's talk about prints a little bit.

23 How does somebody leave a print on an object, whether  
24 or not it's a fingerprint or a footprint?

25 A. So generally a print is left when somebody touches or

1 handles an item in some way and they have something covering  
2 their hands, such as sweat or dirt or makeup or what have you,  
3 and that substance coats the friction ridge arrangement, and  
4 that arrangement is then transferred onto the item which they  
5 are touching.

6 Q. And does that apply to both fingerprints and footprints?

7 A. It does, yes.

8 Q. Are there different factors that apply to how well a  
9 fingerprint is left behind as opposed to a footprint?

10 A. There are a number of factors that affect whether or not a  
11 print is left behind, whether it be a fingerprint or a  
12 footprint. A lot of it has to do with the type of evidence  
13 that it is, the condition of the evidence, the condition in  
14 which the evidence is stored or held or otherwise is prior to  
15 those prints being -- or prior to the evidence being processed.  
16 Excuse me.

17 In terms of the person leaving the print or  
18 potentially leaving the print, whether or not -- how they  
19 handle the item will affect whether or not they leave a print.  
20 The condition of their skin on their hands or their feet,  
21 whether or not they've just washed their hands, or perhaps they  
22 have very dry skin. If they are overly sweaty or not sweaty  
23 enough. All of those things can factor in as to whether or not  
24 a person will touch an item and subsequently leave a latent  
25 print.

1 Q. What sort of factors go into whether or not someone leaves  
2 a print or a print of sufficient enough detail that you can  
3 compare it?

4 A. All of the things I just mentioned will factor into that,  
5 as well as the item itself. For example, there are two general  
6 types of evidence that we process in the lab, and they're  
7 porous and nonporous.

8 For a porous item, it's something that absorbs water.  
9 So, subsequently, the fingerprint is absorbed into the item,  
10 and a print on that kind of item might be a little bit more  
11 stable over time or environment, depending on where it is being  
12 stored.

13 A nonporous item is something hard, like a table,  
14 where it doesn't absorb water. So the latent print will just  
15 sit on top of that item and is a lot more fragile. So if an  
16 item is overhandled or if it is out in the sun or the rain or  
17 it's very dirty, you may -- a person may touch that item and  
18 not leave a suitable latent print behind, or it may be  
19 destroyed from those environmental factors.

20 Q. Let's talk about the type of object the tent was. What  
21 kind of material was the tent?

22 A. I mainly focused on the floor of the tent, the inside floor  
23 of the tent.

24 The sides and the roof of the tent were a vinyl  
25 material, which is not really suitable for latent print

1 examinations.

2           The bottom of the tent itself was a kind of tightly  
3 woven plastic, and plastic is considered a nonporous type of  
4 evidence.

5 Q. And so is that another material that's not suitable for  
6 maintaining latent prints?

7 A. It certainly can --

8 Q. And correct me if I'm misusing words here. You're the  
9 scientist.

10 A. It certainly can be a material that doesn't necessarily  
11 hold latent prints over a length of time. Again, depending on  
12 how it's stored and what kind of elements it's subjected to,  
13 whether or not it's used again, or handled again after the  
14 person in question has handled that item.

15           Like I said, nonporous surfaces are generally good for  
16 latent prints when they're handled carefully; but if they're not  
17 handled carefully, the prints on the item can be very fragile  
18 and can be destroyed rather easily.

19 Q. And when you talk about handling carefully, is it also  
20 just -- could a factor be the passage of time from when a print  
21 could have been left to when the examination has occurred?

22 A. It can be, yes.

23           MS. ROMINE: Could I have a moment, Your Honor?

24           THE COURT: Yes.

25           (Discussion held at prosecution table.)



1 MS. ROMINE: Your Honor, the Government has no further  
2 questions for this witness.

3 THE COURT: For defendant?

4 MR. FREEBURG: Yes, Your Honor.

5 **CROSS-EXAMINATION**

6 **BY MR. FREEBURG:**

7 Q. Good morning, ma'am. My name is Alex Freeburg, attorney  
8 for Cody Smith.

9 A. Good morning.

10 Q. You never analyzed or lifted any prints from an orange  
11 folding pocketknife, correct?

12 A. I don't believe I received that item, no.

13 MR. FREEBURG: Thank you. No further questions.

14 THE COURT: Any redirect?

15 MS. ROMINE: No, Your Honor.

16 THE COURT: Any objection to excusing and releasing  
17 Ms. Carpenter?

18 MS. ROMINE: None from the Government.

19 MR. FREEBURG: None from the defense.

20 THE COURT: Thank you, Ms. Carpenter, for your  
21 testimony today. You are excused and released from your  
22 subpoena.

23 THE WITNESS: Thank you, Your Honor.

24 THE COURT: The Government may call its next witness.

25 MS. MARTENS: Thank you, Your Honor. The Government

1 calls Karson Semen.

2 (Witness sworn.)

3 COURTROOM DEPUTY: Please take a seat.

4 MR. HUGUS: Judge, if we might approach?

5 THE COURT: Not quite yet, no.

6 COURTROOM DEPUTY: Ma'am, will you please state and  
7 spell your name for the record?

8 THE WITNESS: Karson Haley Ceglia-Chambrot. First  
9 name Karson, K-a-r-s-o-n. Middle name Haley, H-a-l-e-y. Last  
10 name Ceglia-Chambrot -- it's going to be hyphenated -- so  
11 C-e-g-l-i-a hyphenated Chambrot, C-h-a-m-b-r-o-t.

12 THE COURT: Counsel, please approach.

13 (At sidebar.)

14 MR. HUGUS: Judge, I noticed a witness that is in the  
15 courtroom and was at least a potential witness, someone who the  
16 prosecution has indicated they wanted to call and maybe that's  
17 changed, but given the Court's sequestration order, I wanted to  
18 raise that issue.

19 MS. MARTENS: Who is it?

20 MR. HUGUS: I believe the gentleman in the blue shirt  
21 is --

22 MS. MARTENS: Oh, yeah. We're not calling him.

23 MR. HUGUS: -- Mr. Leatham. Is he under a subpoena?

24 MS. MARTENS: Not anymore.

25 MR. HUGUS: Okay.

1 THE COURT: So you're not calling whoever is here?

2 MS. MARTENS: Yes.

3 THE COURT: Does that address your concern?

4 MR. HUGUS: Have you -- I mean, he's under subpoena,  
5 though, right, one way or the other regardless of who  
6 subpoenaed him at this point?

7 MS. MARTENS: Well, he hasn't been called to testify.  
8 He won't testify, and I told him he was released from his  
9 subpoena because we didn't call him -- intend to call him.

10 THE COURT: All right. Any further concerns?

11 MR. HUGUS: If I can have a moment.

12 (Discussion held between defense counsel.)

13 MR. HUGUS: Nothing further, Judge.

14 THE COURT: Thank you.

15 (Sidebar ended.)

16 **KARSON HALEY CEGLIA-CHAMBROT, PLAINTIFF'S WITNESS,**  
17 **DIRECT EXAMINATION**

18 **BY MS. MARTENS:**

19 Q. I think I called you by the wrong name. I referred to you  
20 as Ms. Semen. Can you explain your name?

21 A. So, my name is Karson Ceglia-Chambrot. I got married when  
22 I was 20 years old while I've been in the Navy, so as I may  
23 have been mentioned, yes, my last name used to be Semen at the  
24 time.

25 Q. So was that your maiden name?

1 A. Yes.

2 Q. You mentioned that you're in the Navy. What do you do?

3 A. I'm an aviation ordnance man. I handle weapons, bombs, and  
4 all types of ammunition on helicopters at the moment.

5 Q. Where are you from?

6 A. I am from Naples, Florida.

7 Q. Do you know the defendant?

8 A. Yes.

9 Q. Can you point him out in the courtroom?

10 A. (Indicating).

11 MS. MARTENS: Your Honor, if the record would reflect  
12 that Ms. Ceglia has identified the defendant?

13 THE COURT: The record will so reflect.

14 MS. MARTENS: Thank you.

15 **BY MS. MARTENS:**

16 Q. How do you know the defendant?

17 A. I knew him back in high school.

18 Q. What kind of relationship did you have with the defendant?

19 A. From the very beginning, we were just friends, and,  
20 obviously, it escalated to an actual boyfriend-and-girlfriend  
21 relationship for just a little while.

22 Q. Did you ever have any sexual interactions with the  
23 defendant?

24 A. Sort of, but most of the time, I was uncomfortable.

25 Q. Let me take you to a particular day that you were with the

1 defendant where you were at his house.

2 A. Yes.

3 Q. Can you describe that day?

4 MR. HUGUS: Objection. Lack of foundation.

5 THE COURT: I'm assuming you're referring to at  
6 Defendant Smith's house?

7 MS. MARTENS: Yes.

8 THE COURT: Perhaps you could ask a more narrow  
9 question.

10 MS. MARTENS: May I approach, Your Honor?

11 THE COURT: Yes.

12 (At sidebar.)

13 MS. MARTENS: So I have advised the witness about the  
14 limitations of this Court's liminal order, which was to avoid  
15 particular discussion of the ages of these victims, and so by  
16 asking a rather broad question, I was hoping to avoid running  
17 afoul of that by suggesting a particular age because if we go  
18 to at his house at a particular date or a year in high school,  
19 I think that that gets into an area that I understood the Court  
20 didn't want me to go.

21 So the witness and I have discussed in advance what  
22 I'm looking for with these questions in an attempt to comply  
23 with the Court's order.

24 THE COURT: Mr. Hugus, I don't understand your  
25 foundation question. She was with the defendant at the

1 defendant's house.

2 MR. HUGUS: She just said, "Do you remember" -- I  
3 think she's directing to a specific location, but there's been  
4 no foundation that she had been there more than one time or how  
5 many times or what time we're talking about or those kinds of  
6 things.

7 THE COURT: Well, that objection is overruled.  
8 You may continue.

9 MS. MARTENS: Thank you, Your Honor.

10 (Sidebar ended.)

11 THE COURT: Ms. Martens, if you could state your  
12 question again.

13 MS. MARTENS: Thank you. And I think I'll maybe back  
14 up just a little as well.

15 **BY MS. MARTENS:**

16 Q. So, Ms. Ceglia -- Ceglia, right?

17 A. Yes, that's correct.

18 Q. You said you dated the defendant.

19 Had you ever been to his home before?

20 A. Yes.

21 Q. So, on a particular day at his home, did you have any  
22 sexual interactions with the defendant?

23 A. Um, if you're talking about the sexual interactions I did  
24 have with him, I mean, we made out. I mean, any typical  
25 teenager would be excited about that; but the other

1 interactions, I felt very uncomfortable and didn't know how to  
2 approach it at that time.

3 Q. Let's walk through that day, that day when you became  
4 uncomfortable.

5 What were you doing at the defendant's house?

6 A. Well, as Cody likes to do back in high school, you know, he  
7 would mention all the time that he had a zoo in his backyard,  
8 and I thought, you know, that's pretty cool. Like, his parents  
9 were awesome. And I remember going to a zoo when I was very,  
10 very little. Like, I think I was, like, 6 when I went to their  
11 zoo. I was on a field trip. And then when he told me that was  
12 his zoo, I wanted to actually go see it for myself.

13 And, you know, we were walking around. I got to see  
14 his house for a bit, met his little sister. She's the cutest  
15 little thing ever.

16 Then we went around the zoo, and we were walking  
17 around and got to see a bunch of different animals. I think I  
18 got hugged by a giraffe. That -- that was the most amazing  
19 experience I've ever had, just going to say, that giraffe was  
20 awesome. I miss that giraffe.

21 But you know, we were just walking around and just --  
22 he was just showing me everything, what he did, you know, how  
23 he took care of the animals, like, what his parents did with  
24 them and all that.

25 And there were a couple of interactions where, you

1 know, we would make out. And --

2 Q. Can you describe those?

3 A. A lot of tongue action.

4 The other interactions, like, he would try to escalate  
5 it a bit. And, you know, being in high school and being my age  
6 at that time, I didn't know how to approach that, nor did I  
7 know what to say to any of it.

8 Q. So when you said he tried to escalate it, what does that  
9 mean?

10 A. Well, he would try to go further with it. He would try  
11 to -- he would put his hands, like, all over me, in, like, you  
12 know in a nice manner, I thought it was nice at first. And  
13 then, like, he would go underneath my shirt, try to grope my  
14 boobs, and -- sorry, I'm, like, shaking right now. I'm trying  
15 to calm down.

16 Q. That's okay.

17 A. And he would -- I remember being out in, like, this grass  
18 field where he got on top of me and started making out with me  
19 as if he was trying to have intercourse with me.

20 Q. What did you do?

21 A. I remember stopping it 'cause I didn't know what else to  
22 do. I never knew what sex was. I never even did it at that  
23 time, so all of that was new to me. And I had to stop him, and  
24 I remember his mother walked by and then, you know, we walked  
25 somewhere else and --



1 Q. How did you stop him?

2 A. I shoved him off.

3 Q. Did you say anything to him?

4 A. I said, "We got to stop." Like, I didn't know how to  
5 respond to it. I just told him to stop. And I didn't know  
6 what it was like to be uncomfortable until I was in that  
7 moment.

8 Q. And then what happened?

9 A. Then we walked over, I think it was like a -- like a little  
10 gazebo area. It was, like, this big, white, tented area, very  
11 beautiful. There was like a big ole plant in the middle,  
12 everything. There was couches around. So it was like a little  
13 event area in, I think, like, the middle of the zoo.

14 And, you know, we were just laying on the couch, just  
15 having a good time, talking, and, you know, we did get to  
16 making out again. And then, you know, he was getting handsy,  
17 you know, touching me all over.

18 And then I remember --

19 Q. And what did you do in response to that?

20 A. To be honest, I kind of let it just keep going because I  
21 thought it was normal. I literally, literally thought that was  
22 normal.

23 And then I remember him putting his hands down my  
24 pants 'cause I think he got the wrong idea from me, and --

25 Q. What did you do?

1 A. I was trying to grab his hand out of my pants 'cause he  
2 penetrated me with his fingers, and I remember telling him,  
3 "Stop" multiple times until I had to grab his hand out of my  
4 pants. And I had to basically get off of him. And, you know,  
5 now being my age now, knowing what this is, that's -- that was  
6 the scariest thing I ever had to deal with. But that wasn't my  
7 first time.

8 Q. So let's talk about that a little bit. You said he  
9 penetrated you. Where exactly did he touch you?

10 A. He was going into my vagina. He penetrated my vagina, and  
11 I was very, very uncomfortable with that day.

12 Q. With both of his hands or just one?

13 A. It was just one. The other one, he was -- I don't remember  
14 where he was holding me down, but he was. And just having to  
15 rip his hands out of my pants.

16 And then I remember we would walk back to his house  
17 and we were spending time with his little sister for a bit, and  
18 I think we were in his bedroom. He kind of, like, had some  
19 sort of bunk bed at the time.

20 And then, you know, I didn't think --

21 THE COURT: Ma'am --

22 THE WITNESS: Yes?

23 THE COURT: I think you've answered her question.

24 THE WITNESS: Oh, I'm sorry.

25 BY MS. MARTENS:

1 Q. That's all right. I'm going to back you up just a little  
2 bit.

3 A. Okay.

4 Q. Was your genitals the only place that he touched you?

5 A. I mean, when he was getting handsy, he was touching all  
6 over my body in a very sexual way.

7 Q. Did he kiss you?

8 A. Yes.

9 Q. Did you protest to any of those?

10 A. To the kissing, no, I didn't, 'cause, you know, I thought I  
11 was going to be in a happy relationship with Cody Smith, and I  
12 was going to be dating a guy who had a zoo in his background.  
13 I thought that was cool.

14 That's all I wanted, was a good, decent relationship.  
15 And then when that escalated and it turned to that, I -- I  
16 didn't know what to do. I didn't -- I knew it wasn't right. I  
17 just didn't know how to respond to any of it.

18 Q. You mentioned that he held you down with one hand while he  
19 penetrated you with the other.

20 Where were your hands?

21 A. Well, both of them were trying to get him off of me.

22 Q. Let's go back to I think you said you were laying in the  
23 grass in a field?

24 A. Yes.

25 Q. You said he got on top of you.

1 A. Yes.

2 Q. Where was he touching you then?

3 A. I would say, like, mainly my boobs and my butt, like in  
4 those areas, typically, and we were having a very heated  
5 make-out session in that little part of the grass.

6 Q. And at some point, you became uncomfortable. What was that  
7 point?

8 A. I think it was when we were kissing, and, you know, he was  
9 trying to bite my lip and it was hurting, and I kind of had to  
10 like, tell him, like, you know, "Stop," okay, like, "That's not  
11 sexy anymore. That's just you trying to rip my lip off."

12 Q. Did you -- is that something close to what you said?

13 A. Yes.

14 Q. What did you do?

15 A. Well, I basically shoved him off of me and then, you know,  
16 that's when his mom walked on by. I guess she was doing her  
17 own thing around the zoo. I didn't know what she was doing.

18 MS. MARTENS: Your Honor, may I have a moment?

19 (Discussion held at prosecution table.)

20 MS. MARTENS: Your Honor, the Government has no  
21 further questions for this witness.

22 THE COURT: All right. Thank you, Ms. Martens.  
23 For defendant.

24

25

**CROSS-EXAMINATION**

**BY MR. HUGUS:**

**Q.** Good morning. My name is Jeremy Hugus, and I'm one of the lawyers for Cody Smith.

Is it true that you want to get back at Cody?

**A.** No. I'm here today to support someone because they went through this. I'm not here to get revenge. I forgot about Cody six years ago, and I didn't think I would have to see him again in this courtroom.

**Q.** Do you remember some phone calls with Investigator or Agent Olson?

**A.** Yes.

**Q.** And in those conversations -- I think there were two conversations that you had with him, right?

**A.** Yes.

**Q.** And in those conversations he told you about what happened, why he was calling you and what he wanted to discuss with you and he had some questions for you, right?

**A.** Yes.

**Q.** And his questions were about your relationship with Mr. Smith?

**A.** Yes.

**Q.** And you were honest with him about what information you had when you talked to him?

**A.** Yes.

1 Q. And you were honest with him about your willingness to help  
2 him in this case?

3 A. Yes.

4 Q. And the motivations for that?

5 A. Yes.

6 MR. HUGUS: Judge, I would like to offer Defense  
7 Exhibit J1 as an impeachment exhibit.

8 MS. MARTENS: Your Honor, I object. This is improper  
9 impeachment through extrinsic evidence. And he hasn't properly  
10 offered it to the witness.

11 THE COURT: I'm not sure what J1 is. If you could  
12 identify it so that I might -- is it an audio clip?

13 MR. HUGUS: Yes, Your Honor, it is an audio clip of  
14 the conversation that she testified as having had with  
15 Mr. Olson regarding what she would testify about in this trial  
16 and the motivations for doing so, and I think she's laid the  
17 foundation for those things, Your Honor.

18 MS. MARTENS: Your Honor, I object to the playing of  
19 the audio. There is a transcript available for counsel to  
20 properly impeach the witness with, so that it is not put before  
21 the jury.

22 MR. HUGUS: I believe she gets the opportunity to be  
23 presented with the exhibit and then to explain anything  
24 connected to it or to be cross-examined, Judge.

25 THE COURT: Counsel, if you could approach.

1 (At sidebar.)

2 THE COURT: For clarification, Mr. Hugus, is it that  
3 snippet of the conversation where she -- I forget exactly what  
4 her phrasing is, but about how much she dislikes him or  
5 something to that effect? Is it just that?

6 MR. HUGUS: It is just that, Judge, yes. It is a  
7 limited snippet very specifically connected to the questions  
8 that I just asked her.

9 THE COURT: Okay. I guess I don't disagree with your  
10 general position, but I would ask that you first say the:  
11 "Didn't you tell Agent Smith" so that you actually tee up an  
12 inconsistency and then you can play it and then I will grant  
13 permission to play that little audio.

14 MR. HUGUS: Okay.

15 MS. MARTENS: Just to be clear, it is being  
16 substantively offered in evidence, then?

17 THE COURT: Is it what?

18 MS. MARTENS: Is it being substantively offered into  
19 evidence?

20 THE COURT: Yes, as impeachment evidence, if he can  
21 establish -- if she says no, I didn't tell him that, then I  
22 think it is proper extrinsic evidence admissible for  
23 impeachment purposes.

24 So I just want it teed up rather than the general, you  
25 know, you're trying to get back at him or whatever. I just

1 don't remember enough, so if you could tee it up with her  
2 verbiage, and if she says, "Yes, I told him that," we're not  
3 going to admit it.

4 If she denies it --

5 MS. MARTENS: Your Honor, Rule 613 specifically  
6 prohibits the admissibility of this type of impeachment  
7 evidence.

8 THE COURT: A prior inconsistent statement?

9 MS. MARTENS: That's the hearsay rule, but the --

10 MS. ROMINE: Your Honor, if I may, Rule 613 does allow  
11 for impeachment. It sounds like there's improper impeachment  
12 occurring here. Rule 613 prohibits the admission of extrinsic  
13 evidence in support of impeachment. Proper impeachment is  
14 allowing the witness an opportunity to review the statement  
15 without revealing it to the jury and then confronting the  
16 witness with that statement.

17 By playing it, what that is, it is the equivalence of  
18 extrinsic evidence as opposed to allowing the witness -- if  
19 they wanted to --

20 THE COURT: I agree, which is why I encouraged him to  
21 actually read her language because she did not prepare this  
22 transcript, it wasn't certified. I don't care how it is teed  
23 up. You can give her this to review. You can read it. But I  
24 agree with the Government on that, that it has to actually be  
25 teed up for use as proper impeachment and it is not yet. All



1 right?

2 MS. MARTENS: Thank you, Your Honor.

3 (Sidebar ended.)

4 MR. HUGUS: Am I good to proceed, Judge?

5 THE COURT: Yes.

6 MR. HUGUS: Thank you.

7 **BY MR. HUGUS:**

8 Q. I had asked you earlier about why you were doing this, and  
9 you gave some explanation about that. You also talked about  
10 talking to Agent Olson.

11 Did you ever tell Agent Olson that you were giving  
12 this testimony to get back -- helping him out to get back at  
13 Cody? Did you ever tell him that?

14 A. I do not recall. I don't really have a good memory, I'm  
15 sorry. There was a lot of things that we talked about that was  
16 regarding Cody Smith.

17 But yes, to answer your question, I'm doing this to  
18 help this girl.

19 THE COURT: That wasn't his question.

20 THE WITNESS: Okay.

21 MR. HUGUS: If I may show the witness a statement,  
22 Judge?

23 THE COURT: Yes.

24 **BY MR. HUGUS:**

25 Q. I'm showing you what is a transcript of the conversation

1 that you had with Agent Olson. I don't want you to read it out  
2 loud. I would just like you to look over that and tell me if  
3 that refreshes your recollection about what you told Agent  
4 Olson.

5 Does that refresh your recollection about what you  
6 told Agent Olson -- Agent Olson about your involvement in this  
7 case?

8 A. Yes.

9 Q. And you told him that you were doing this because Mr. Smith  
10 was a dick to you, correct?

11 A. I wasn't just doing this because --

12 Q. I'm asking what you told Agent Olson. You told him because  
13 Mr. Smith was a dick to you, correct?

14 MS. MARTENS: Objection, Your Honor. This misstates  
15 the witness' statement.

16 BY MR. HUGUS:

17 Q. And you told Agent Olson that you would kind of like to get  
18 back at him even though you hadn't thought about him this  
19 entire time, correct?

20 A. Yes.

21 THE COURT: The objection is overruled with that  
22 supplementation. Thank you.

23 MR. HUGUS: Thank you, ma'am. I have no other  
24 questions for you.

25 THE COURT: All right. Ms. Martens.

1 MS. MARTENS: Thank you, Your Honor.

2 **REDIRECT EXAMINATION**

3 **BY MS. MARTENS:**

4 Q. Ms. Ceglia, are you angry about what happened?

5 A. Yes.

6 Q. Why?

7 A. I apologize for my outburst, though. I'm sorry about that.

8 Q. Why?

9 A. I'm angry because I've already been in that position  
10 before, not just with him but with other people. I don't want  
11 anyone else having to go through this. It is not okay. Should  
12 never be okay. It is messed up.

13 MS. MARTENS: Your Honor, may I have just a moment?

14 THE COURT: Yes.

15 (Discussion held at prosecution table.)

16 MS. MARTENS: Your Honor, I have no further questions  
17 for this witness.

18 THE COURT: Any objection to excusing -- excuse me --  
19 excusing and releasing Ms. Ceglia-Chambrot?

20 THE WITNESS: Ceglia-Chambrot.

21 THE COURT: Thank you.

22 Any objection?

23 MS. MARTENS: No, Your Honor.

24 THE COURT: For the defendant?

25 MR. HUGUS: No. Thanks, Judge.

1 THE COURT: Karson is a lot easier. Thank you, ma'am,  
2 for your testimony today. Safe travels.

3 THE WITNESS: Thank you.

4 THE COURT: You're excused and released.

5 And the Government may call its next witness.

6 MS. MARTENS: Your Honor, we're running a bit ahead of  
7 schedule and our next witness will not actually be available  
8 until about 2:00, so at this time I would ask for an extended  
9 lunch break to help accommodate some of those travel  
10 arrangements.

11 THE COURT: It is always happy news to hear that  
12 anyone is running ahead of schedule.

13 MS. MARTENS: Especially in a courtroom.

14 THE COURT: Thank you. Hearing no objection from  
15 defendant, we will take our lunch break until 2:00 to report  
16 back to the courtroom.

17 I know that Mrs. Davis plans to use some time to do a  
18 presentation that she typically does on realtime with the  
19 jurors. I don't know if it will just be with one group or  
20 both. Just one today.

21 What time do you recommend, 1:45 for the jury to be  
22 here or -- 1:40?

23 And is that the jurors in 1?

24 So the jurors in juror room 1, please return for the  
25 realtime presentation by 1:40. We will expect to call you in

1 here to resume trial at 2:00.

2 For the other jury room, if you could be in your jury  
3 room by 1:50, that will permit us to make sure that we can  
4 attend to any business and call you in close to 2:00 without  
5 additional delay.

6 So with that, we'll stand in recess for the call of  
7 this case until 2:00.

8 (Following out of the presence of the jury.)

9 THE COURT: For the Government, is there anything  
10 requiring my attention?

11 MS. MARTENS: No. Thank you, Your Honor.

12 THE COURT: For the defendant?

13 MR. HUGUS: No, Judge.

14 THE COURT: All right. I would ask the attorneys to  
15 be here at 1:45, 1:50 so that hopefully we can wrap up  
16 Mrs. Davis' presentation, get all the jurors here and be ready  
17 to start close to 2:00. Thank you. Thank you very much for  
18 your patience.

19 We'll stand in recess until 2:00.

20 (Proceedings recessed 11:53 a.m., May 12, 2021.)

21 (Proceedings reconvened 2:03 p.m., May 12, 2021.)

22 THE COURT: Please be seated.

23 In Docket 20-CR-45, the Court notes the presence of  
24 the jury with roll call waived, the presence of counsel and  
25 their clients.

1 The Government may call its next witness.

2 MS. MARTENS: Thank you, Your Honor.

3 Government calls Tori Guarino.

4 (Witness sworn.)

5 COURTROOM DEPUTY: Please take a seat.

6 Ma'am, can you please state and spell your name for  
7 the record?

8 THE WITNESS: Tori Guarino, T-o-r-i, G-u-a-r-i-n-o.

9 **TORI GUARINO, PLAINTIFF'S WITNESS**

10 **DIRECT EXAMINATION**

11 **BY MS. MARTENS:**

12 Q. Ms. Guarino, what's your current occupation?

13 A. I'm a student at Florida Gulf Coast University.

14 Q. Where are you from?

15 A. I'm from Naples, Florida.

16 Q. Do you know the defendant?

17 A. Yes.

18 Q. Can you point him out in the courtroom?

19 A. Right over there.

20 MS. MARTENS: Your Honor, may the record reflect that  
21 Ms. Guarino has identified the defendant?

22 THE COURT: The record will so reflect.

23 **BY MS. MARTENS:**

24 Q. Ms. Guarino, how do you know the defendant?

25 A. Um, we met during high school. I knew him in high school

1 and then he messaged me through Instagram and we started  
2 chatting.

3 Q. And did you develop some sort of relationship after you met  
4 him?

5 A. Yes. Yes, we -- he asked me out I feel like maybe a week  
6 after we met, and then a few more weeks we were in a  
7 relationship.

8 Q. What is NGALA?

9 A. That was the wildlife reserve that his dad owns.

10 Q. Did you ever go there?

11 A. Yes. Maybe once or twice and then there was this one  
12 specific night that we had been planning to hang out for a  
13 week. We had the plan to go out and get dinner beforehand and  
14 bring it back to NGALA, and that one night --

15 MS. MARTENS: Thank you, Your Honor.

16 THE COURT: Maybe you could turn to your next  
17 question.

18 BY MS. MARTENS:

19 Q. What was the plan that evening for hanging out at NGALA?

20 A. The plan was to go out, get food and bring it back and then  
21 to do, I guess, sexual things which were kind of talked about  
22 beforehand but there were some hesitancies discussed.

23 Q. When you say they were "some hesitancies discussed," what  
24 did you say to the defendant?

25 A. Well, some things were said that --

1 MR. HUGUS: Objection. Sorry, Your Honor. I'm  
2 objecting to -- pursuant to the previous order discussed.

3 THE COURT: The objection is preserved for the record.

4 Ma'am, it would be helpful rather than talk in a  
5 passive tense such as, "It was discussed," if you spoke  
6 directly about what you said or what he said.

7 THE WITNESS: All right.

8 THE COURT: Do you have the question in mind or do you  
9 want the attorney to ask --

10 THE WITNESS: To repeat it.

11 MS. MARTENS: And I will rephrase to help try to  
12 clarify, Your Honor.

13 **BY MS. MARTENS:**

14 Q. So did you discuss sex with the defendant before that  
15 evening that you met him at NGALA?

16 A. Yes, we did discuss it.

17 Q. And what did he ask of you?

18 A. He asked if I was ready and if -- yeah, if I was ready, and  
19 I proposed my hesitancies, I'm not sure, I don't think we  
20 should do that. And it was brought up multiple times leading  
21 up to that night.

22 Q. Did you ever talk about whether or not you were ready?

23 A. Yes. I said that I was not a few times.

24 Q. I'm sorry, I didn't catch the last part?

25 A. A few times, yes.



1 Q. A few times?

2 So when you met that evening, what were you expecting  
3 to do at NGALA?

4 A. I was expecting to eat dinner and then -- we were in a  
5 relationship -- relationship, so making out was okay, you know,  
6 but I did not expect it to go all the way.

7 Q. Did you do those things that night?

8 A. Yes, yes.

9 Q. Can you describe that for us?

10 A. So we ate dinner and I don't really -- so he got off work  
11 and then he picked me up. We went out and then we went to  
12 NGALA and then I'm not sure really how long we were there  
13 before we ended up with the intercourse. I didn't -- I don't  
14 really know the time frame.

15 But when we got there, we were on the couch, and --

16 Q. I'm going to slow you down a little bit.

17 So you were there. You ate your dinner. Did you  
18 drink any wine?

19 A. Um, he poured me a glass and I'm not a direct quotation,  
20 but something along the lines of, "This will make it a little  
21 easier," kind of hinting at what the intentions were for the  
22 rest of the night. And -- yeah. So --

23 Q. Did you consume it?

24 A. I think I took a sip of -- just the gesture, but it was  
25 placed on another table and I didn't go back to it.

1 Q. Did you start to touch each other?

2 A. Yes. When we were on the couch -- I don't really remember  
3 the exact things, per se, but I remember like my clothes came  
4 off and then he asked the question, "Oh, do you think you're  
5 ready?" And I said, "Oh, no," like, "Not right now. I don't  
6 know." Very hesitant, not knowing really what to say but I  
7 thought we were on the same page in that matter. And then he  
8 said, "I'm going to go grab the condom from my car," and then  
9 he got up and he -- it was just a few steps away but there was  
10 a path from the car to the couch.

11 Q. What happened when he came back?

12 A. I would say I froze. I didn't really know what to do  
13 because we were on the same page -- I thought we were on the  
14 same page right before he went to the car. I thought that we  
15 established that I wasn't ready, and then I just was kind of  
16 there, and he put on the condom.

17 Q. How did he touch you?

18 A. I guess just really intercourse. I was just lying there.

19 Q. So you said you froze and then what body part did he touch  
20 with which body part of his?

21 A. So --

22 MR. HUGUS: Your Honor, I'm going to object again and  
23 renewing the previous objection. Thank you.

24 THE COURT: Counsel, please approach.

25 (At sidebar.)

1 THE COURT: I have a question and then I'll turn to  
2 you.

3 MR. HUGUS: Sure.

4 THE COURT: I'm uncertain as to the record as it is  
5 currently established that we have enough to satisfy the  
6 Court's limitation that the alleged victim needs to communicate  
7 nonconsent in some fashion, so maybe not words or whatever.

8 MS. MARTENS: Yes. So her testimony so far, Your  
9 Honor, is that she and the defendant had discussed this in  
10 advance, that they had established that they -- that she was  
11 not ready for intercourse that night. She was okay with making  
12 out with him. And when he again prompts her for intercourse,  
13 she says, "I don't think I'm ready," that's certainly not  
14 consent. She freezes and then he penetrates her.

15 THE COURT: Well, he leaves to go and get a condom,  
16 and I don't -- I guess I -- I think we should -- I would  
17 appreciate more in the lines of --

18 MS. MARTENS: Clarifying the timeline?

19 THE COURT: Well, yes. I mean, she freezes. He goes  
20 to get the condom and then he comes back and I don't -- from my  
21 perspective, I don't understand why a person would believe we  
22 are on the same page when he says, "I'm going to get a condom,"  
23 and leaves.

24 And so that, I guess, is one of the areas that I  
25 thought perhaps we could get a little bit more information

1 about.

2 MS. MARTENS: Certainly, yeah, try and straighten out  
3 that timeline. Because she was elaborating when I asked her to  
4 go back and elaborate, so we hadn't -- that's why I asked her,  
5 you know, where did he touch you, what happens next. It is  
6 coming out a little jumbled on this end.

7 THE COURT: Yes, I would agree with that in terms of  
8 that for my level of comfort.

9 I think I understand what she's trying to say but I  
10 think the record could be a little clearer on that.

11 And, Mr. Hugus, your objection is a little too vague  
12 for me to grasp.

13 MR. HUGUS: I know. I just wanted to address that it  
14 was connected to the order and I appreciate that Your Honor  
15 took the initiative to call the sidebar here.

16 So the objection is that the order is specifically  
17 limited to these types of contacts, sexual contact that are  
18 against the protestations of an alleged victim. I want to make  
19 the objection on the record that all of this testimony so far  
20 be stricken because it is not specific to that -- this Court's  
21 order on that. And it is not in a number of ways.

22 When she was asked whether or not she protested, she  
23 said, "I don't really remember." That's her testimony, that's  
24 the evidence right now.

25 Then she says, "I was on the couch sitting there

1 naked. He got up and said, "I'm leaving to go get a condom."  
2 And she stayed there. If the idea that some previous statement  
3 that is made is somehow adequate to establish a protestation,  
4 then almost certainly the inverse would be true that because we  
5 had discussed having sex on a prior occasion, and you said it  
6 was okay, now I would be permitted to have sex anytime because  
7 we had discussed it and you consented and said it was okay, and  
8 so then when we got up later, you know, later in the evening,  
9 we're going to have sex because we discussed and you said it  
10 was fine.

11 Well, that seems absurd because, as there's been  
12 commentary, a person could withdraw their consent at any time.

13 So having discussed it in some vague generalities and  
14 saying, "I'm not sure I'm ready," is not a protestation. A  
15 protestation, I think, as I understand it from the Court's  
16 order is, "No, don't do this. Stop," or something to that  
17 effect. Everything that she's testified to so far is that they  
18 had intercourse and that she didn't protest to it and that is  
19 in direct violation, as I understand it, and as I read it of  
20 this Court's order.

21 So for that reason, I'm asking for this witness'  
22 testimony to be struck at this point.

23 MS. MARTENS: If I may, Your Honor?

24 THE COURT: Um, I'm going to overrule the objection  
25 and motion to strike but ask the Government to try to --

1 MS. MARTENS: Streamline it.

2 THE COURT: -- manage this in smaller bites so that we  
3 have a clearer picture of -- I think what the witness is trying  
4 to communicate is that she protested, but I'm not -- I'm still  
5 very fuzzy because of -- and I think she's nervous.

6 MS. MARTENS: Yes, yes.

7 THE COURT: And certainly that's completely  
8 understandable. And so I will grant some leeway if we could  
9 just --

10 MS. MARTENS: Yes, Your Honor.

11 THE COURT: -- get into more testimony and you  
12 certainly have my permission to do what you need to do to  
13 manage the witness so it doesn't all come out with the end, "We  
14 had intercourse," although that's what her testimony has been  
15 to date.

16 I think I can deal with that if ultimately we can't be  
17 sufficiently -- I can't be sufficiently satisfied that it is  
18 within the confines of the order.

19 MS. MARTENS: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. HUGUS: One more question for clarification,  
22 just -- it will help so I'm not making needless objections,  
23 certainly.

24 So what is it that the -- I guess what is the Court's  
25 requirement or expectation, then, regarding testimony of

1 protestation and what -- and what will constitute that, number  
2 one; and number two, if I need to make further objections,  
3 what's the Court's pleasure on how I phrase that objection?

4 THE COURT: Well, I will allow a continuing objection.

5 MR. HUGUS: Okay. I will just say "continuing  
6 objection."

7 THE COURT: Well, you can lodge it on the record.

8 MR. HUGUS: Sure, yeah.

9 THE COURT: You can -- and I will respect that that's  
10 continuing, and -- but I will permit the Government to sort of  
11 reposition the testimony of this witness to the point where it  
12 comes out a little clearer chronologically in smaller bites so  
13 that we know what was communicated.

14 My intent is that it does not have to be orally  
15 communicated.

16 MR. HUGUS: Sure, yeah.

17 THE COURT: Protestations can occur otherwise, but I  
18 need to have a clear picture in my mind.

19 MS. MARTENS: Thank you, Your Honor.

20 THE COURT: Thank you.

21 MR. HUGUS: Thanks, Judge.

22 (Sidebar ended.)

23 THE COURT: Ms. Martens, please continue.

24 MS. MARTENS: Thank you, Your Honor.

25 **BY MS. MARTENS:**

1 Q. Ms. Guarino, you said you were on the couch, and you were  
2 making out with the defendant.

3 What happened next? I just want to walk through it in  
4 small pieces.

5 A. Okay. And then so we were on the couch. Um, and then the  
6 conversation kind of went down of like, "Are you ready? Are we  
7 doing this right now?" And I said, "I don't know. I don't  
8 think we should. Not ready," kind of like what we were texting  
9 the previous days, just the not ready.

10 And then even though I said this, he said, "I'm going  
11 to go grab the condom from my car." So then the couch would be  
12 right here and then the path, and then his car, so he's walking  
13 there --

14 Q. So then he gets up and he goes from the couch?

15 A. Yes, to his car, grabs the condom, comes back. And then  
16 I'm still there, and I -- I don't know what to do at this point  
17 'cause I said my hesitancies. I said that I didn't want to.

18 And he was going through the motions, you know,  
19 putting on the condom, kind of getting on top and --

20 Q. So I'm going to slow you down a little bit.

21 Did you do anything to communicate that you might want  
22 to be touched?

23 A. Um, I guess just being there, I guess, not having --

24 Q. Did you kiss him back? Did you touch him?

25 A. I don't remember.



1 Q. So he's getting on top of you.

2 What happens next?

3 A. Then, um -- and I can --

4 Q. Is -- go ahead.

5 MR. HUGUS: Your Honor, I'm renewing the standing  
6 objection as previously noted.

7 MS. MARTENS: Can I ask a question to clarify?

8 THE COURT: Yes.

9 **BY MS. MARTENS:**

10 Q. So before you said you froze.

11 When was it that you froze?

12 A. Um, I guess when -- I -- I don't remember necessarily but I  
13 guess just him coming back. I don't know what you mean.

14 Q. I think you answered my question.

15 THE COURT: Miss, I know this is uncomfortable, and  
16 please relax to the extent you can.

17 So Mr. Smith comes back. Did you sort of remain in a  
18 frozen state?

19 Did you tell him again that you were not ready or that  
20 you didn't want to or you didn't know if you wanted to?

21 Did you -- did you communicate anything orally or by  
22 your body position or anything like that or -- I'm having a  
23 hard time understanding whether you said anything after he came  
24 back.

25 THE WITNESS: I really don't remember the exact words

1 said, if I'm being completely honest.

2 THE COURT: I'm sorry. You tapered down.

3 THE WITNESS: I don't remember the exact words said.

4 THE COURT: Did you communicate anything?

5 THE WITNESS: I knew that we were on the same page of  
6 that I wasn't ready.

7 THE COURT: You knew that?

8 THE WITNESS: I thought that we were on the same page.

9 THE COURT: And why did you have that belief?

10 THE WITNESS: Because we were texting the previous  
11 days leading up to this. We had these plans for about a week  
12 about what we were going to do, about getting dinner, hanging  
13 out that night.

14 THE COURT: But obviously when he said he was going to  
15 go and get the condom, that would signal, I would think -- and  
16 please correct me, because I'm not you and I wasn't there --  
17 that he wasn't on the same page.

18 Did you do anything to suggest that this isn't the  
19 page we were on or -- do you remember?

20 THE WITNESS: No, I don't remember the exact words  
21 said. But I --

22 THE COURT: It is okay if you don't remember the exact  
23 words, but do you remember whether you said anything?

24 THE WITNESS: I -- I -- I don't know. I wasn't into  
25 it. I wasn't in the -- I don't know.

1 THE COURT: And I appreciate that. I guess what we're  
2 trying to figure out is whether that -- your feeling, whether  
3 that was communicated to Mr. Smith in some fashion and, if so,  
4 how.

5 You said that you didn't feel like you were into it.  
6 Kind of stepping back, looking at it as an observer from the  
7 outside looking at that scenario now through your memory, did  
8 you communicate that feeling in some fashion?

9 THE WITNESS: Just saying, "I don't know. I'm not  
10 ready."

11 THE COURT: Then at the time when he was putting the  
12 condom on?

13 THE WITNESS: I don't remember what I said at those  
14 exact -- at that exact time.

15 THE COURT: Let me turn it back over to you. Thank  
16 you.

17 MS. MARTENS: Thank you, Your Honor.

18 **BY MS. MARTENS:**

19 Q. So the last thing you said to Mr. Smith was you're not  
20 ready?

21 A. Yes.

22 Q. And did you do anything --

23 MR. HUGUS: Objection, Judge. It misstates the --

24 THE COURT: Ma'am -- Mr. Hugus, I -- please wait for  
25 her question because if you interrupt then I've forgotten the

1 first part of the question. I would just ask you wait until  
2 her question is presented.

3

4 MR. HUGUS: Well, I think it was for the prior  
5 question. I do apologize if I stepped on the question. But I  
6 think I'm objecting to the question that was fully formed or  
7 the statement that was fully formed insofar as it was a  
8 misstatement of the testimony that was just given, I believe,  
9 with the Court.

10 THE COURT: Well, I'll overrule that question at this  
11 point and ask you to form a question, and if you believe the  
12 question is objectionable, please call that to my attention.  
13 Thank you.

14 MR. HUGUS: Thank you.

15 **BY MS. MARTENS:**

16 Q. As I understand your testimony, the last thing you remember  
17 saying to Mr. Smith was that you were not ready; is that right?

18 A. Yes.

19 Q. And did you do anything to take that back?

20 A. No.

21 MS. MARTENS: Might I have just a moment, Your Honor?

22 THE COURT: Yes.

23 (Discussion held at prosecution table.)

24 MS. MARTENS: Your Honor, at this time, I don't have  
25 any further questions for this witness.

1 THE COURT: Thank you, Ms. Martens.

2 For defendant?

3 MR. HUGUS: No questions from the defense, Judge.

4 Thank you.

5 THE COURT: Any objections to excusing and releasing  
6 this witness?

7 MS. MARTENS: None from the Government, Your Honor.

8 MR. HUGUS: No, Your Honor.

9 THE COURT: Thank you, Miss. I appreciate your time  
10 and travel. Safe travels back. You're excused and released  
11 from the subpoena.

12 The Government may call its next witness.

13 MS. MARTENS: Your Honor, regretfully, again, we are  
14 ahead of schedule, and my next witness will not be ready until  
15 3:00.

16 THE COURT: All right. Why don't we take our  
17 mid-afternoon break a little early, then. Again -- well, I  
18 forgot the last break. I was so excited to have a little  
19 longer lunch.

20 Please remember the admonition against discussing this  
21 case with anyone, including each other. Please don't do any  
22 research about this case, and, as always, please keep an open  
23 mind until all the evidence is in.

24 We'll stand in recess until 3:00.

25 (Following out of the presence of the jury.)

1 THE COURT: Anything for me?

2 MS. MARTENS: Nothing from the Government, Your Honor.

3 THE COURT: All right. We will stand in recess until  
4 3:00 p.m.

5 (Recess taken 2:25 p.m. until 3:28 p.m.)

6 (Following in the presence of the jury.)

7 THE COURT: Please be seated.

8 In Docket 20-CR-45, the Court notes the presence of  
9 the jury with roll call waived.

10 The Government may call its next witness.

11 MS. MARTENS: Thank you, Your Honor. The Government  
12 calls Laura Albertorio-Vasquez.

13 (Witness sworn.)

14 COURTROOM DEPUTY: Please take a seat.

15 Ma'am, would you please state and spell your name for  
16 the record?

17 THE WITNESS: My name is Laura Albertorio, L-a-u-r-a,  
18 and my last name, A-l-b-e-r-t-o-r-i-o.

19 **LAURA ALBERTORIO, PLAINTIFF'S WITNESS, DIRECT EXAMINATION**  
20 **BY MS. MARTENS:**

21 Q. Ms. Albertorio, what's your current occupation?

22 A. I'm a college student.

23 Q. Where are you from?

24 A. I'm from Florida.

25 Q. What city?

1 A. Naples.

2 Q. Do you know Cody Smith?

3 A. I do.

4 Q. How do you know him?

5 A. We dated.

6 Q. Is he here in the courtroom today?

7 A. He is.

8 Q. Can you point him out?

9 A. (Indicating).

10 MS. MARTENS: Your Honor, could the record reflect  
11 that Ms. Albertorio has identified the defendant?

12 THE COURT: The record will so reflect.

13 BY MS. MARTENS:

14 Q. You said you dated. About how long did you date?

15 A. About four months.

16 Q. In that time, did you become familiar with any of his  
17 habits?

18 A. I did.

19 Q. Did he have any habits regarding a knife?

20 A. Yes.

21 Q. And what was that?

22 A. He would keep the knife in his car.

23 Q. While you were dating, did you ever have any sexual contact  
24 with Mr. Smith?

25 A. I did.

1 Q. I'd like to talk about two particular incidents.

2 First, let's talk about the incident in the car.

3 Do you remember what you were doing that day?

4 A. Not particularly.

5 Q. Do you remember being with the defendant?

6 A. Yes.

7 Q. Where were you?

8 A. In the car driving to the beach.

9 Q. Can you speak up just a little bit?

10 A. I'm sorry. I was in the car driving to the beach.

11 Q. Did you spend some time at the beach?

12 A. Uh-huh.

13 Q. What did you do at the beach?

14 A. We mostly just swam, sat in the sand.

15 Q. What did you do next?

16 A. Then we went back to the car.

17 Q. What happened in the car?

18 A. We started to, um, kiss and then proceeded to have sex.

19 Q. Was that consensual?

20 A. (Witness nods head.)

21 Q. What happened next?

22 A. As we started --

23 THE COURT: I'm sorry. Before you go on, you need to  
24 answer the question orally.

25 THE WITNESS: Uh-huh, yes.



1 THE COURT: Yes, thank you.

2 MS. MARTENS: I apologize, Your Honor.

3 THE COURT: Thank you.

4 BY MS. MARTENS:

5 Q. So when you said that you consented to sex, let's be a  
6 little bit more specific.

7 What kind of sex?

8 A. I consented to vaginal penetration.

9 Q. What happened after that?

10 A. He proceeded to -- sorry -- he proceeded to, um, try and  
11 have anal sex with me without my consent.

12 Q. How did you communicate your lack of consent?

13 A. I told him no. I started crying.

14 Q. You said he tried to. Did he manage to penetrate you?

15 A. Yes.

16 Q. How did it feel?

17 A. It hurt.

18 Q. What did you do?

19 A. I told him no and proceeded to lay there and waited until  
20 it stopped.

21 Q. What happened next?

22 A. We just drove. Afterwards it just ended, and we put on our  
23 clothes.

24 Q. What were his hands doing while that was happening?

25 A. I remember being choked, and that was pretty much it.

1 Q. I want to turn to the closet incident.

2 Do you remember that day?

3 A. I do.

4 Q. What were you doing that day?

5 A. I was at his house and we were in his room, and then we,  
6 um, proceeded to close the door and then have sex.

7 Q. What kind of sex?

8 A. Um, just standard. Just regular sex, just vaginally.

9 Q. And what happened next?

10 A. Um, we started kissing, and then he led me to his closet  
11 'cause his sister was home. And then we ended up having sex in  
12 the closet.

13 Q. What did you do?

14 A. Um, I just laid there, and it was very uncomfortable for  
15 me.

16 Q. What did you say?

17 A. I said no, that I didn't want to be in the closet.

18 Q. Why?

19 A. Because I'm very claustrophobic, and I don't like tight  
20 spaces.

21 Q. When did you first say no?

22 A. About halfway through.

23 Q. Halfway through what?

24 A. Us having sex.

25 Q. Was that before or after you went into the closet?

1 A. After we went into the closet.

2 Q. Did he stop?

3 A. No.

4 Q. When did it stop?

5 A. After he finished.

6 Q. What happened next?

7 A. We just put on our clothes, and I went to the bathroom and  
8 got myself cleaned up.

9 Q. What does that mean?

10 A. Checked to see if there was any blood.

11 Q. Was there blood?

12 A. Yes.

13 Q. Do you remember where his hands were when that was  
14 happening, when the sex was happening?

15 A. Around my neck.

16 MS. MARTENS: Your Honor, may I have a moment?

17 THE COURT: Yes.

18 (Discussion held at prosecution table.)

19 MS. MARTENS: Your Honor, I have no further questions  
20 for this witness.

21 THE COURT: Thank you.

22 For defendant.

23 **CROSS-EXAMINATION**

24 **BY MR. HUGUS:**

25 Q. Good afternoon. My name is Jeremy Hugus, and I'm one of

1 the lawyers for Cody Smith.

2           You testified that you and Mr. Smith dated for about  
3 four or five months; is that right?

4 A. Four months.

5 Q. Four months?

6           When in that period was the two instances that you  
7 just discussed?

8 A. Um, about the second month we were dating.

9 Q. And that would have been when?

10 A. Around April and May.

11 Q. Okay. And that would be both -- both of those instances?

12 A. Yes.

13 Q. In the course of your dating relationship with Mr. Smith,  
14 you talked about your relationship with him, correct?

15 A. Yes.

16 Q. And the two of you had extensive Snapchat conversations  
17 about your relationship, correct?

18 A. We did.

19 Q. And in those conversations, you talked about your  
20 relationship, your intimacy, all of those things?

21           MS. MARTENS: Your Honor, I need to object here.

22 There has been no motion under 414 to bring in other instances  
23 of conduct with regard to this witness, sexual conduct with  
24 regard to this witness.

25           THE COURT: Mr. Hugus?

1 MR. HUGUS: Yes. I think counsel is referring to Rule  
2 412, Your Honor. I haven't asked any questions regarding  
3 sexual conduct, and I will represent to the Court that I don't  
4 intend to.

5 THE COURT: I will overrule the objection for now, and  
6 certainly, as has been previously extended, we'll see how this  
7 line of questioning is pursued.

8 MR. HUGUS: Thank you, Judge.

9 THE COURT: Would you restate your question? I don't  
10 believe there was a response.

11 BY MR. HUGUS:

12 Q. In those -- in those Snapchat conversations, the two of you  
13 discussed your relationship extensively, correct?

14 A. Yes.

15 Q. You discussed intimate things in those conversations,  
16 correct?

17 A. Yes.

18 Q. And is it fair to say that Snapchat was a primary way that  
19 you and Mr. Smith communicated about your relationship?

20 A. No.

21 Q. And by that, what do you mean? I mean, you had extensive  
22 conversation by Snapchat with him, correct?

23 A. We did.

24 Q. Okay. And that was both while you were dating and  
25 subsequent to your dating relationship, correct?

1 A. Yes.

2 Q. Your Snapchat name is Lauriebelle --

3 A. Yes.

4 Q. -- is that right?

5 I want to show you, and I'm not publishing to the  
6 jury, but what I'm representing to you is a screenshot of your  
7 Snapchat kind of heading or identifier at the top, and if you  
8 could just confirm for me if that is the Snapchat that would  
9 belong to your account or that's associated with your account?

10 A. Yes.

11 Q. Okay. And do you recognize this as a conversation that you  
12 would have had with Mr. Smith?

13 A. Yes.

14 Q. And you told him that he was the sweetest, kindest, nicest,  
15 hottest, funniest guy that you'd ever met, right?

16 A. Yes.

17 Q. After your dating relationship ended, you continued to  
18 Snapchat with him, and in those conversations --

19 MR. HUGUS: I'm sorry. I lost my --

20 **BY MR. HUGUS:**

21 Q. Do you recognize this as a Snapchat that you would have had  
22 with Mr. Smith after you were dating?

23 A. Can you please repeat the question?

24 Q. Do you recognize this as a Snapchat conversation or  
25 exchange that you had with Mr. Smith after you were dating?

1 A. Yes.

2 Q. And in that conversation, you told him that you still care  
3 about him too much to hurt him, correct?

4 A. Yes.

5 Q. And that you'll always remember him, correct?

6 A. Yes.

7 Q. And that you loved everything we did together, correct?

8 A. Yes.

9 Q. And you told him that you were doing okay after the breakup  
10 and you thought it was good that you stayed close friends,  
11 correct?

12 A. Yes.

13 Q. And that you'd see what happens in the future, correct?

14 A. Yes.

15 Q. And you told him that you were happy and doing well and  
16 glad that you're really close friends now, correct?

17 A. Yes.

18 MR. HUGUS: Just if I might have a minute, Your Honor?

19 THE COURT: Yes.

20 (Discussion held between defense counsel.)

21 BY MR. HUGUS:

22 Q. And I just want to go back. To be clear, those were --  
23 those screenshots, those are Snapchats that you recognize from  
24 your account, and those are all accurate Snapchat conversations  
25 that you had with Mr. Smith, correct?

1     **A.**   Yes.

2                 MR. HUGUS:  Your Honor, defense would move to admit  
3     Exhibit KL.  And I have no other questions for this witness.

4                 Thank you, ma'am.

5                 THE WITNESS:  Thank you.

6                 MS. MARTENS:  Your Honor, I object to the admission of  
7     this exhibit substantively.  It was never disclosed to the  
8     prosecution.

9                 THE COURT:  I'll sustain the objection.  While I have  
10    no knowledge concerning the disclosures and certainly don't  
11    intend to suggest your representation isn't correct, I have a  
12    concern that it contains out-of-court statements.  We have the  
13    witness here, and she has testified to the effect of the  
14    conversations relating to her that counsel wish to pursue, and  
15    as to Mr. Smith's responses, they would be inadmissible  
16    hearsay.

17                So with that, Exhibit KL is not admitted.

18                MR. HUGUS:  Thanks, Your Honor.

19                THE COURT:  Thank you.

20                Any redirect?

21                MS. MARTENS:  May I have just a moment, Your Honor?

22                THE COURT:  Yes.

23                (Discussion held at prosecution table.)  
24  
25



## REDIRECT EXAMINATION

**BY MS. MARTENS:**

Q. Ms. Albertorio, Mr. Hugus asked you about some instances where you expressed affection for the defendant.

**A. Yes.**

g. Did you have affection for him while you dated him?

A. I did.

Q. Was he always kind to you?

A. No.

g. Did you ever train in martial arts?

A. I did.

Q. Did he?

**A.** He did.

g. Could he overpower you?

**A. Yes.**

g. Did he overpower you?

**A.** He did.

MR. HUGUS: Objection, beyond the scope of the --

THE COURT: I agree and sustain the objection.

The jury will disregard the witness' response to the last question.

BY MS. MARTENS:

Q. Why did you feel the need to keep in touch with him after he left for the Navy?

**A.** I felt bad. I felt that -- I felt that it was my fault.

1 Q. That what was your fault?

2 A. That he wasn't interested in me anymore.

3 MS. MARTENS: May I have a moment, Your Honor?

4 THE COURT: Yes.

5 (Discussion held at prosecution table.)

6 MS. MARTENS: I have no further questions for this  
7 witness.

8 THE COURT: All right. Any objection to excusing and  
9 releasing this witness?

10 MS. MARTENS: No, Your Honor.

11 MR. HUGUS: No, Your Honor.

12 THE COURT: All right. Thank you, Laura, for your  
13 time today and your testimony. You're excused and released.

14 The Government may call its next witness.

15 MS. MARTENS: Your Honor, that completes the  
16 Government's case-in-chief.

17 THE COURT: All right. Thank you.

18 I know it's early today, but the Government's  
19 case-in-chief, in large part through stipulations the parties  
20 jointly entered into, was shorter than anticipated. The  
21 defendant's case, if any -- and just as a reminder, the  
22 defendant has no burden of proof and has no burden or  
23 expectation of a case-in-chief. But I have been advised that  
24 there are possible witnesses who have been subpoenaed for  
25 appearance tomorrow.

1           Consequently, we will recess for today, having run out  
2 of witnesses.

3           So I appreciate your patience as we move along. I'd  
4 ask that the jury be ready to report to the courtroom tomorrow  
5 morning at 8:15.

6           Please remember the admonition against discussing this  
7 case with anyone, including each other. Please don't research  
8 anything about this case or this type of case, and please keep  
9 an open mind until all the evidence is in.

10           Anything from the Government before we recess the jury  
11 for the day?

12           MS. MARTENS: No, Your Honor. Thank you.

13           THE COURT: Anything from defendant?

14           MR. HUGUS: No, Judge.

15           THE COURT: And is my understanding correct, that the  
16 witnesses are expected tomorrow?

17           MR. FREEBURG: Yes, Your Honor.

18           THE COURT: Or at least -- all right. For a minute  
19 there, I lost all track of time and thought in all likelihood I  
20 misspoke.

21           So we will have an expectation -- again, only by  
22 representation and not because the defendant has any burden,  
23 but we do have an expectation of additional witnesses. I think  
24 I went through all the advisements, other than the reminder to  
25 please keep an open mind until all the evidence is in.

1           Have a nice evening. We'll stand in recess until  
2 tomorrow morning at 8:15.

3           (Following out of the presence of the jury.)

4           THE COURT: Please be seated.

5           At this phase of the case, it's customary to inquire  
6 as to whether or not there are any motions to present to the  
7 Court. We have moved along very efficiently, with the Court's  
8 appreciation to the Government as well as defense counsel, in  
9 entering stipulations and managing their case so efficiently  
10 and effectively.

11           If you wish a short break prior to the -- any  
12 argument; alternatively, if you have no argument at this phase  
13 of the case and wish to preserve that for later, please advise.

14           Also, if the defendant may be anticipating taking the  
15 witness stand, notwithstanding the fact that he has the  
16 constitutional right to remain silent, I normally take some  
17 time to address directly with the defendant his rights without,  
18 certainly, invading the province of the attorney/client  
19 communication or strategy, just to make sure that he is fully  
20 advised.

21           MR. FREEBURG: Judge, we will represent that the  
22 defendant does not intend to testify.

23           THE COURT: I'm sorry. You know, if anything happens  
24 in my zone -- the zone of hearing on my good ear, I can't quite  
25 hear anything else.

1           So, Mr. Freeburg, would you state again?

2           MR. FREEBURG: Judge, at this point, the defendant  
3 does not anticipate testifying, and I don't think we need to go  
4 over any of those.

5           THE COURT: All right. If that changes, certainly,  
6 again, I -- those advisements are not intended to be  
7 discouraging; it's just to make sure that the defendant is  
8 fully advised. If that were to change, we'll just manage that  
9 time within the trial calendar so that we can cover those  
10 matters.

11           We're not to the point of dealing with instructions,  
12 but I did want to advise that my hope is to have a charging  
13 conference, if not earlier, depending upon the length of  
14 defense case-in-chief, no later than over the lunch period  
15 tomorrow.

16           Does the defense have an estimation of the length of  
17 its case-in-chief?

18           MR. FREEBURG: No, Your Honor. I think we should  
19 be --

20           THE COURT: Or if you've got -- you know, you don't  
21 have to provide an estimate. If you -- if you've got some  
22 other feedback on my expectation to do the charging conference  
23 over noon, that basically was what I was driving at.

24           MR. FREEBURG: No, Your Honor. But I would ask the  
25 Court for an opportunity to make a Rule 29 motion, either now

1 or tomorrow morning.

2 THE COURT: Yes. We certainly can address that now,  
3 unless you'd like a short break. I also wanted to address  
4 another matter for the benefit of counsel.

5 So what's your pleasure?

6 MR. FREEBURG: Judge, I would like to hear about the  
7 other matter first.

8 THE COURT: All right. I wanted to discuss with you  
9 my -- the inclination that I may rule to strike Tori Guarino's  
10 testimony in total on the conclusion that in order for that  
11 testimony to be admitted, I, first, must make the preliminary  
12 finding that there's a reasonable expectation that the jury  
13 could find a prior act constituting sexual assault occurred.

14 I wanted to give that inclined ruling so that if  
15 they're -- for the benefit of argument on that. Certainly that  
16 affects our instructions, and I wanted to hear any argument or  
17 anything beyond what has already been placed on the record and  
18 what we heard through her testimony so that I might benefit  
19 from more than just my observations.

20 So that was the matter that I did want to bring up  
21 today so that we can wrap up our instructions. My intent is to  
22 get to some point of -- some fixed point on that matter so that  
23 we can finalize those instructions and get them out to counsel  
24 today so that you have the benefit of reviewing them, and then  
25 we can have a good opportunity for a reasonable charging

1 conference over that lunch hour.

2           So with that, Ms. Martens, is there -- are there  
3 observations or arguments you want to bring to my attention  
4 on -- as to Ms. Guarino's testimony?

5           MS. MARTENS: Thank you, Your Honor. Please.

6           So when we're looking at Ms. Guarino's testimony,  
7 certainly it didn't come out as orderly as I had hoped. But in  
8 the end, Ms. Guarino testified that before her encounter with  
9 Mr. Smith, there was a clear expectation that she was not ready  
10 for intercourse. She testified that that expectation was  
11 established both in conversation and through text message.  
12 That evening, she was not expecting to engage in intercourse,  
13 and that, even though she consented to him touching her and  
14 kissing her and, I think she used the phrase "generally making  
15 out," she did not consent to intercourse.

16           She broadcast that lack of consent by telling  
17 Mr. Smith that she was not ready. And despite those  
18 statements, Mr. Smith retrieved a condom and then he crawled on  
19 top of her and penetrated her.

20           She also testified that she did nothing to change her  
21 statement. While she could not clearly remember exactly what  
22 she said, she said the last thing that she remembered saying  
23 was that she was not ready and that she did nothing to change  
24 that sentiment.

25           And I think that that's enough evidence for this Court

1 to show that there was a lack of consent to the penetration  
2 that occurred. Certainly someone does not have to punch  
3 somebody else in the nose or run from the room. Dr. Lindberg  
4 educated myself and the jury about the most common responses to  
5 having one's boundaries overwhelmed are fight, flight and  
6 freeze.

7 Ms. Guarino testified that she froze. And I think  
8 that on that evidence, this Court can determine that Mr. Smith  
9 did, in fact, sexually abuse her, and I think that the jury  
10 could reasonably conclude that Mr. Smith did, in fact, sexually  
11 abuse her.

12 THE COURT: Thank you.

13 MS. MARTENS: Thank you.

14 THE COURT: For defendant?

15 MR. HUGUS: Your Honor, the basis for the motion, as  
16 the Court knows, is the Court's previous order, and that order  
17 says: "More specifically, this includes the proffered evidence  
18 of choking, biting and restraining" -- and this was in  
19 reference to another witness, but it was the Court's ruling  
20 that this applied to each of the proposed 413 witnesses -- "and  
21 perpetrating" -- sorry -- "sexual contact or sexual acts over  
22 the alleged victim's protestations."

23 And the basis for the motion is there was no evidence  
24 of a protestation. And a protestation is an emphatic no: "I  
25 protest." That is not saying, "I'm not sure if I'm ready."



1 It's not ambivalence. It's not some prior conversation.

2 And the testimony was she went; they hung out; her  
3 clothes came off. She didn't even say they were -- her clothes  
4 were removed forcibly or against her protestations. And then  
5 that Mr. Smith left and indicated explicitly his intent, which  
6 was to retrieve a condom.

7 And what she did not say is, "I told him, 'No, don't.  
8 You better not. We're not doing this. Fine, I'm leaving,'" or  
9 even put her clothes back on while he retrieved a condom.

10 And then he returns, and they start having sex, and  
11 she does not testify at all that anything about what she did or  
12 said -- and the Court instructed earlier from the bench that  
13 the protestation need not be verbal only; it could be  
14 demonstrated through physical act. And there was zero evidence  
15 of any physical act, that she did anything that would  
16 constitute a protestation.

17 She froze, and she doesn't remember what she said or  
18 what she did, and I believe the Court questioned her on that  
19 point specifically, "Ma'am, did you do anything else? Did you  
20 move your body or position yourself in any way?" And the  
21 answer is no. There's no protestation, and for those reasons,  
22 all of that testimony refers to sexual conduct under Rule 413  
23 that is outside the scope of the Court's order in response to  
24 the prosecution's motion on 413 testimony.

25 So for that reason, we certainly renew the motion and

1 argue in favor of the motion to have that witness and that  
2 testimony stricken completely.

3 Thanks, Judge.

4 THE COURT: Thank you.

5 Ms. Martens, might I ask a question of you?

6 MS. MARTENS: Certainly, Your Honor.

7 THE COURT: I'm trying to recall as well as I can the  
8 testimony from the doctor. And it's -- I want you to help me  
9 understand your argument because I agree that the doctor  
10 testified about the responses, the three typical responses, and  
11 how the freeze or froze response wasn't generally well  
12 understood and developed through the work of psychiatrists and  
13 psychologists working in this field.

14 But in my recollection of that testimony, the  
15 responses were to an event or a trauma or to an assault or  
16 abuse; and while it's, I think, certainly understandable that  
17 if -- if she perceives this as a trauma, she might not have a  
18 clear recollection about what was said when.

19 Her comments about freezing were before anything that  
20 was -- that could be considered nonconsensual, so I don't --  
21 are you arguing that it was enough to prompt that response that  
22 Mr. Smith said he was going to go and get the condom? That  
23 just that alone -- because that's how I recall her testimony,  
24 was that that was when she froze. It wasn't sort of during the  
25 event or moments before or whatever.

1           So I'm having a hard time, I guess, with this freeze  
2 explaining why nothing else is very clear on this whole consent  
3 issue.

4           MS. MARTENS: Certainly, Your Honor.

5           THE COURT: Because I feel like I need to find some  
6 sufficient evidence to show lack of consent. And I tried to  
7 work with her. You did, I thought, an admirable job. She --  
8 her testimony was what it was, but we still have -- I'm still  
9 left with a conundrum about how that suffices.

10          MS. MARTENS: Yes. So I thought that when we sort of  
11 stopped and went back through, so we had -- my recollection of  
12 the testimony is that she was sort of quickly running through,  
13 and she said, "I froze." And then I asked her to go back and  
14 then try and piece those details.

15          And that's when, I think, we had the bench conference.  
16 So it wasn't clear when she was saying she froze -- I thought  
17 we cleared it up that it was frozen -- I think she might have  
18 been triggered when he announced his intention to go get the  
19 condom, but I thought we cleared it up that she was frozen when  
20 he approached her after getting the condom, that she took no  
21 action, that she remained frozen.

22          And so, you know, when we talk about Dr. Lindberg,  
23 what he talked about was in the face of trauma, many victims  
24 disassociate, which means they completely disconnect from their  
25 body, and that goes along with freezing. And so the ability to

1 resist, verbalize, those sorts of things, essentially evaporate  
2 in some people. In fact, most people.

3 You'll recall the doctor saying that his experience is  
4 that most people freeze when confronted with trauma.

5 And after her saying, "I'm not ready," and Mr. Smith  
6 announcing his clear intention to violate her boundaries,  
7 that's that violation of those set boundaries that is the  
8 trauma. When we start looking at sexual abuse, certainly sex  
9 acts are things that people engage in consensually on a regular  
10 basis; but they are traumatic when they occur while bypassing  
11 boundaries, however they may be set, in relationships, societal  
12 expectations, the bypass of those boundaries is the trauma.

13 Now, Dr. Lindberg testified about how the brain  
14 functions during trauma and how it is that your prefrontal  
15 lobe, the blood shunts away from it, and essentially your  
16 ability to reason is greatly diminished, and that's part of why  
17 people do things that are weird when under these kinds of  
18 stresses.

19 And so her announcing her boundary, "I'm not ready,"  
20 him announcing his clear intention to violate that boundary,  
21 that is most certainly a trauma.

22 And then, when he comes back and she says, I did  
23 nothing to change my position, and yet Mr. Smith penetrated  
24 her, that is yet another violation of her boundaries. And that  
25 freeze response, I think, is doubly triggered in a situation

1 like this, along with the behaviors that the doctor explained  
2 to the jury in terms of disassociating, fragmented memory,  
3 difficulty recalling the details of the event. All of those  
4 things, I think, are exemplified in Ms. Guarino's testimony.

5 THE COURT: All right. Thank you.

6 MS. MARTENS: Thank you.

7 THE COURT: I appreciate the opportunity to have a  
8 frank discussion on that point. I plan on rereading her  
9 testimony and, again, making a decision so that I can -- we can  
10 finalize the instructions.

11 MR. HUGUS: Might I make a brief comment in response,  
12 Judge?

13 THE COURT: Yes.

14 MR. HUGUS: One of the issues that Ms. Martens brought  
15 up is the signalling of intent through the -- the  
16 statement on -- her statement, "He says he's going to go get a  
17 condom."

18 As the Court noted, the way that we can protest is not  
19 just verbal, it's also through our actions.

20 And, similarly, we can also indicate consent through  
21 our actions. And so the idea that she made a statement at one  
22 point, the last thing that she remembers, and she doesn't say  
23 it even happened that night. She said they talked about it  
24 before, and the last thing she ever remembers communicating  
25 verbally was, "I don't know that I'm ready for this yet," at

1 some point.

2 But a lot of things happened in between there which  
3 was them getting together, them spending time together, them  
4 being on the property, her clothes coming off, all of those  
5 things.

6 And so importantly, I think, there were other things  
7 communicated nonverbally as well that don't -- that modify  
8 someone's understanding about what level of consent that we're  
9 talking about. I mean, every person that has some kind of  
10 sexual relationship or let's call sexual intercourse makes a  
11 series of moves and dances, and they're communicating the  
12 entire time, verbally and nonverbally, to get from a place like  
13 where I am right now to where I'm fully clothed to a place  
14 where they're having sexual intercourse. And there's moment by  
15 moment, pieces of communication, encoding and decoding that are  
16 happening.

17 And so the state of being there without clothes on is  
18 a piece of communication that is not communicating specifically  
19 protestation, and I think that that's important because there's  
20 this interim piece of communication.

21 Also, the -- the signalling of the intent through the  
22 walk to the car to get the condom isn't itself a violation,  
23 isn't itself forced sexual contact, and isn't itself illegal.

24 And as I said earlier at the bench, just because  
25 consent is given for sexual intercourse through a conversation

1 does not mean it cannot be subsequently withdrawn like that  
2 (indicating). And the reverse is true, that just because I  
3 say, "No, I'm not in the mood," or "I'm not ready," does not  
4 mean I can't also change my mind and my opinion subsequently  
5 and communicate that change through other things that I do and  
6 the way I communicate with my body and my clothes and those  
7 kinds of things.

8 Thanks, Judge.

9 THE COURT: Thank you, Mr. Hugus.

10 All right. Are we ready for our motion argument?

11 MR. FREEBURG: Judge, we make our motion pursuant to  
12 Rule 29(a), moving for a judgment of acquittal specifically  
13 with respect to the kidnapping charge.

14 The testimony the Court received from the alleged  
15 victim was that there was a moment in time at the McDonald's  
16 when they were choosing between going to the apartment and  
17 going to Yellowstone, and she said, "Just go." And they went  
18 to Yellowstone.

19 There's subsequently a text message at 11:47 from  
20 Ms. Bye, "I'm good," in response to, "Are you okay?" And so  
21 for that reason, there's not a jury that could find -- a  
22 rational jury could not find beyond a reasonable doubt that  
23 there was not consent to that trip to Yellowstone.

24 Secondly, with respect to the sexual contact in the  
25 tent, the evidence is generally insufficient.

1           And if the Court has any questions on those points,  
2 I'm happy to elaborate, but I wanted to keep it concise.

3           THE COURT: Thank you. I -- as I understand your  
4 argument, your argument really hones in on the definition of  
5 the word "kidnap" in the first element because I -- I don't  
6 think that there's any disagreement that her being in the car  
7 is a situation where that amounts to a confinement. It's not  
8 like she can -- I guess, she can possibly open the door and  
9 jump out, but that's risking some injury.

10           So the issue is whether that confinement is against  
11 the victim's will.

12           MR. FREEBURG: Yes, Judge.

13           THE COURT: And is that -- is that where you're  
14 focusing?

15           MR. FREEBURG: Yes, Judge, given the evidence that she  
16 voluntarily consented to go to Yellowstone. And further, the  
17 prosecution in this case has submitted a jury instruction that  
18 coercion or force is an essential element of kidnapping, so  
19 related to that jury instruction, there isn't sufficient  
20 evidence of any force of confining her in the vehicle.

21           THE COURT: I'm not sure force is an element. Isn't  
22 it just involuntary or coercion?

23           I guess the prosecutor can perhaps address that. You  
24 and I struggling with it in terms of the elements of the  
25 offense -- I just wanted to make sure I was focused on the crux



1 of the argument. It's on whether the -- whether there --  
2 whether the element of kidnapping is present, whether it's  
3 involuntary, coercion; whether that has been shown, as well as  
4 whether the confinement was against the victim's will.

5 MR. FREEBURG: Yes, Judge. And I was using force and  
6 coercion interchangeably, and they are different.

7 THE COURT: No, that's fine. I just wanted to -- and  
8 again, the Government can sort us out on that.

9 Thank you, Mr. Freeburg.

10 For the Government?

11 MS. MARTENS: I apologize, but I couldn't hear  
12 Mr. Freeburg as to the sexual contact.

13 THE COURT: I don't believe he argued anything as to  
14 sexual contact.

15 MS. MARTENS: All right. Wonderful. I just wanted to  
16 make sure that I hadn't misunderstood.

17 THE COURT: I didn't hear anything either, but  
18 Mr. Freeburg, did we miss something there?

19 MR. FREEBURG: Judge, I just said it was generally  
20 insufficient, but I didn't point to any specific --

21 THE COURT: All right. All right.

22 Thank you for clarifying that. I think I was not -- I  
23 was thinking and not listening.

24 So, Ms. Martens.

25 MS. MARTENS: Thank you, Your Honor.

1           So I think that we narrowed it down to whether or not  
2 Ms. Bye wanted to go to Yellowstone with Mr. Smith. And so  
3 most of the elements of kidnapping I think are not in dispute  
4 based on my understanding of counsel's argument.

5           So if we narrow it down to knowingly acting contrary  
6 to law, kidnapped Hannah Bye by seizing, confining, inveigling  
7 her as charged and kidnapping in the instructions talking about  
8 a person who is unlawfully held, kept, detained and confined  
9 against that person's will. So there was plenty of talk about  
10 whether Ms. Bye wanted to go to Yellowstone with Mr. Smith.

11           And I think a lot of the evidence, especially on  
12 cross-examination that we're looking at here had to do with  
13 that Tinder conversation.

14           Now, when you look at the Tinder conversation that  
15 Ms. Bye and Mr. Smith engaged in, which is before this Court in  
16 Government Exhibit 100A, what you'll find is that Ms. Bye and  
17 Mr. Smith engaged in some conversation. She said she was new  
18 in town, didn't have any friends, she was kind of sad. And  
19 then Mr. Smith starts to talk about meeting up. Ms. Bye joins  
20 that conversation.

21           And then when we get to -- I want to be able to point  
22 the Court to the specific pages -- so Mr. Smith suggests to  
23 Ms. Bye on page 24 of this exhibit to hang out in Yellowstone.  
24 Ms. Bye says she's never been. He asks if she wants to go.  
25 "Bet, LOL, but I don't have a car." So that's Saturday

1 afternoon at 1:49 p.m. on September 7th. Ms. Bye says she  
2 would like to go to Yellowstone. He offers to pick her up,  
3 asks if she is free. She asks, "Tomorrow?"

4 He says, "Today."

5 She says, "um, I can't today, but I can tomorrow."

6 And that's entirely consistent with her testimony, that she'd  
7 never been to Yellowstone National Park, that that Saturday she  
8 had intended simply to meet Mr. Smith to go to the McDonald's,  
9 and she didn't intend to spend the night with Mr. Smith, simply  
10 to hang out with him.

11 Now, when we're talking about the motion for judgment  
12 of acquittal, the standard here is that the evidence is viewed  
13 in the light most favorable to the Government, and Ms. Bye  
14 certainly repeatedly emphasized that she did not want to go to  
15 Yellowstone that night. She had only communicated a general  
16 interest in maybe going to Yellowstone at some point and, while  
17 in the car with him, repeatedly insisted that she did not want  
18 to go to Yellowstone.

19 On cross-examination, she explained that, sure, she  
20 said, "Just go," but that was after she told the defendant, "I  
21 want to go home." So in context, it was, "Take me home," not,  
22 "Take me to Yellowstone."

23 But even after they turned out of the parking lot, she  
24 continued to protest.

25 So in the light most favorable to the Government, I

1 believe there's more than sufficient evidence for that matter  
2 to go to the jury, and I think that that was essentially the  
3 argument on kidnapping.

4 Now, as to the abusive sexual contact, we have a  
5 general denial. So, most of the elements of that charge are,  
6 again, satisfied by the stipulations of the parties. So we  
7 don't have to worry about the timing in terms of September 7th  
8 and 8th; within the District of Wyoming or the boundaries of  
9 Yellowstone National Park because the parties agree that they  
10 traveled and were present in the Park on that day, and then we  
11 have to talk about knowingly engage in and cause sexual  
12 contact, specifically defined 18 USC 2246(3).

13 So we need the intentional touching, directly and  
14 through the clothing of genitalia, anus, groin, breast, inner  
15 thigh and buttocks of the victim with intent to humiliate,  
16 harass, degrade, and to arouse or gratify the sexual abuse of  
17 any person accomplished by force or the attempted use of force.

18 Ms. Bye's testimony stands on its own for this point.  
19 She testified about all of the places that the defendant  
20 touched her directly and under her clothing, to include her  
21 breasts, her groin, her inner thigh and buttocks. She didn't  
22 talk about her anus or her genitalia. She said that his hands  
23 made it up to the edge of her underwear. But we don't have to  
24 get to her genitalia or her anus to satisfy this charge. We've  
25 covered everything else in the definition.

1           So we do have evidence of the contact. And then  
2 accomplished by force, she testified that the defendant choked  
3 her and held her down while he did this, that he was on top of  
4 her, and she couldn't get out from underneath him.

5           That's more than enough to satisfy use of force or  
6 attempted use of force.

7           And then specifically she also testified that she  
8 repeatedly told him no. And, Your Honor, that's more than  
9 enough, especially taken in the light most favorable to the  
10 Government on its own, and yet we have pictures of the injuries  
11 that she sustained, along with other corroborating evidence to  
12 satisfy the Government's burden here.

13           Thank you.

14           THE COURT: Thank you.

15           Anything further, Mr. Freeburg?

16           MR. FREEBURG: No, Your Honor.

17           THE COURT: All right. Thank you.

18           Well, I deny the Rule 29 motion for judgment of  
19 acquittal, in large part for the reasons argued by the  
20 Government. I believe that in viewing the evidence in the  
21 light most favorable to the Government, I can't conclude that a  
22 reasonable juror would find -- there's going to be too many  
23 noes in that sentence.

24           But considering the evidence in the light most  
25 favorable to the Government, it's my conclusion that the

1 evidence is sufficient to go to the jury as to the essential  
2 elements of the charges brought in this indictment.

3 With that, is there anything else that we should  
4 discuss?

5 For the Government?

6 MS. MARTENS: Nothing, Your Honor.

7 THE COURT: Are you amenable to a charging conference  
8 at -- over the kind of longish lunch break tomorrow?

9 MS. MARTENS: Yes, Your Honor.

10 THE COURT: And feel free, even though we don't  
11 usually permit food in the courtroom, feel free to bring your  
12 lunch.

13 MS. MARTENS: Thank you. I appreciate that.

14 THE COURT: For the defendant, anything further?

15 MR. FREEBURG: No, Judge.

16 THE COURT: All right. And to you, again -- I'm  
17 sorry, I didn't mean to interrupt you.

18 Are you agreeable to the charging conference as  
19 described? And, again, you're more than welcome to bring your  
20 lunch.

21 MR. FREEBURG: Yes, Your Honor, with the only thought  
22 that if we need a moment to speak with our client, we'd ask the  
23 Court's grace -- and, excuse me, I've been trained to sit while  
24 talking to a microphone.

25 THE COURT: Oh, yeah, you can remain seated. You're

1 too tall for me to hear. So I'd rather hear than attend to  
2 those niceties.

3 MR. FREEBURG: No, Judge. We're happy to do it over  
4 the lunch hour, only with the caveat we may ask the Court's  
5 permission to meet with our client around 9:00.

6 THE COURT: All right. You bet.

7 With an eye towards that, would it be better to meet  
8 right upon our recess, or to give you some time before we  
9 reconvene?

10 MR. FREEBURG: I expect we would want to meet with our  
11 client after the charging conference.

12 THE COURT: All right. Thank you.

13 Then we'll do the charging conference after we recess  
14 the jury and probably give you, you know, some time, likely ten  
15 minutes, to get your lunch or get your materials collected for  
16 the conference.

17 And, again, we'll have -- we'll have the draft to you  
18 sometime today so that you can review it, and hopefully then we  
19 can be as productive as possible at the conference.

20 All right?

21 MR. FREEBURG: Thank you.

22 THE COURT: Thank you.

23 With that, we'll -- oh, I did want to mention, too,  
24 just as a reminder to please give opposing counsel the list of  
25 witnesses and accompanying exhibits today for tomorrow, and if

1 you can give those to the court reporter and courtroom deputy  
2 either today or tomorrow morning, at the latest, all right?

3 MR. FREEBURG: Yes, Judge.

4 THE COURT: And it doesn't have to be typed out or  
5 anything, but just something that gives us an opportunity to  
6 follow the expected witnesses to be called and the evidence.  
7 All right?

8 MR. FREEBURG: Thank you.

9 THE COURT: All right. We'll stand in recess until  
10 likely 8:30 in order to bring the defendant up. All right?

11 We'll stand in recess until 8:30 tomorrow morning.

12 (Proceedings recessed 4:33 p.m., May 12, 2021.)

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## C E R T I F I C A T E

I, JANET DAVIS, Federal Official Court Reporter for the United States District Court for the District of Wyoming, a Registered Diplomat Reporter, Federal Certified Realtime Reporter, and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the foregoing proceedings contained herein on the aforementioned subject on the date herein set forth, and that the foregoing pages constitute a full, true and correct transcript.

Dated this 12th day of May, 2021.

/s/ *Janet Davis*

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JANET DAVIS, RDR, FCRR, CRR  
Federal Official Court Reporter

I N D E X

GOVERNMENT'S WITNESSES

PAGE

HANNAH EGBERT

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Cross - Mr. Hugus

Redirect - Ms. Martens

GOVERNMENT'S

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